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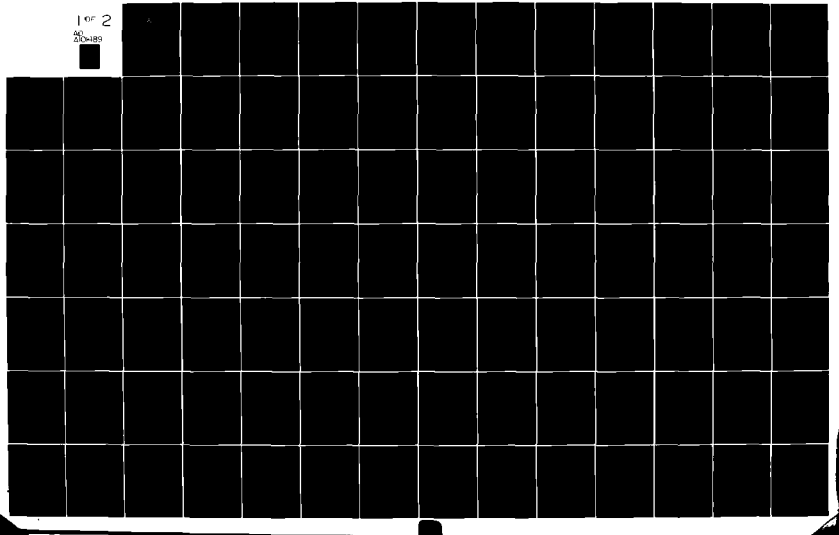

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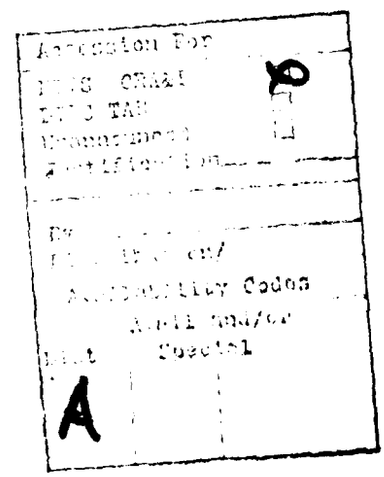
ABSTRACT

This report examines the historical background and fundamental basis for a requirement of bid responsiveness. The report addresses in great deal the distinction between the acceptable and unacceptable nonconforming bid.



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PREFACE

The author is a Judge Advocate, Captain, United States Air Force, currently assigned to the Air Force Systems Command, Armament Development and Test Center, Eglin Air Force Base, Florida. The views expressed herein are solely those of the author and do not purport to reflect the position of the Department of the Air Force, Department of Defense, or any other agency of the United States Government.

Bid Responsiveness And The Acceptable Nonconforming Bid

By

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Thesis directed by

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Professor of Law

FOOTNOTES

1. Prestex Inc. v. United States, 162 Ct. Cl. 620, 320 F.2d 367 (1963); A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974); 52 Comp. Gen. 265 (1972); 20 Op. Atty. Gen. 496 (1892); Claus v. Babiarz, 40 Del. Ch. 500, 185 A.2d 283 (1962); Sutton v. St. Paul, 224 Minn. 262, 49 N.W.2d 436 (1951); Terminal Construction Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 341 A.2d 327 (1975); George Harms Construction Co., Inc. v. Lincoln Park, 141 N.J. Super. 367, 391 A.2d 960 (1978) See generally R. Nash & J. Cibinic, 1 Federal Procurement Law 260 (3d ed. 1977).

2. 42 Comp. Gen. 96 (1962); 33 Comp. Gen. 421 (1954); 30 Comp. Gen. 179 (1950); Coller v. Saint Paul, 223 Minn. 385, 26 N.W.2d 835 (1947); Hillside v. Sternin, 25 N.J. 317, 136 A.2d 265 (1957).

3. Prestex, Inc. v. United States, 162 Ct. Cl. 620, 320 F.2d 367 (1963), is usually cited as the leading authority for this proposition in federal procurement. The basis for this holding is that any subsequent "contract" violates the requirement that award be based upon competitive advertising and consequently in making award the contracting officer has exceeded his authority. The strictness of this rule has been tempered by the exacting rule utilized by the Court of Claims to determine whether the nonconformity renders the contract invalid. This rule is stated as follows:

> In testing the enforceability of an award made by the Government, where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain. If the contracting officer has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit.

John Reiner & Co. v. United States, 163 Ct. Cl. 381, 386, 325 F.2d 438, 440 (1963). Accord, Albano Cleaners Inc. v. United States, 197 Ct. Cl. 450, 455 F.2d 556 (1972). The Comptroller General follows a similar test and unless the illegality of an award is plain, he will direct a termination for convenience rather than cancellation. Lanier Business Products, Comp. Gen. Dec. B-187969, 77-1 CPD ¶ 336 (1977). See generally Note, Government Contracts: The Consequences of An Improper Award, 11 Wm. &

Mary L. Kev. '46 (1962); Schnitzer, Some Limitations on the Validity of Federal Government Contracts Awarded After Formal Advertising, 25 Fed. B.J. 224 (1965).

4. 52 Comp. Gen. 288 (1972); Cannon v. Carlson, 247 Wisc. 343, 345 N.W. 506 (1929); River Vale v. R.J. Longo Construction Co., Inc., 127 N.J. Super 207, 316 A.2d 737 (1974). The Comptroller General has indicated that the interests of the Government are better served by the acceptance rather than the rejection of a bid containing insubstantial deficiencies. 39 Comp. Gen. 595 (1960).

5. The Comptroller General has expressed his view of his authority in no uncertain terms:

> It is the province of this office in settling accounts and determining the availability of appropriations to see that contracts involving the expenditure of public funds be legally made, including observance of the law respecting competitive bidding, and when necessary to that end, to determine as a matter of law the meaning and effect of the terms and specifications used.

[illegible] Comp. Gen. 554, 557 (1937). See generally Gilbert & Backen, The Comptroller General and Government Contracts, 36 Geo. Wash. L. Rev. 340 (1970); Meyer, The Role of the Comptroller General in Awarding Formally Advertised Government Contracts, 19 Admin. L. Rev. 19 (1966); Schnitzer, Changing Concepts in Government Procurement - The Role and Influence of the Comptroller General in Contracting Officer's Operations, 23 Fed. B.J. 10 (1963).

6. The Defense Acquisition Regulation (hereinafter DAR) is printed with identical numbering at 32 C.F.R. Subtit. A, Ch. I, Subch. A, pts. 1-39 (1976). Until recently the regulation was referred to as the Armed Services Procurement Regulation (ASPR). The ASPR has been redesignated as the Defense Acquisition Regulation by DOD Dir. 5000.35, 8 Mar. 1978.

7. The Federal Procurement Regulation (hereinafter FPR) is printed with identical numbering at 41 C.F.R. Subtit. A, Ch. 1, pts. 1-1 to -30 (1978). The National Aeronautics and Space Administration has similar regulations identified as the NASA PR, 41 C.F.R. Subtit. A, Ch. 18, pts. 18-1 to -52 (1978). Since the NASA PR is similar in scope it is not separately discussed in this paper.

8. Until recently the Comptroller General represented the only forum in which a bidder could obtain review of decisions of agency officials in awarding contracts. Pertinent [illegible]

Steel Co., 310 U.S. 113 (1940). In Scanwell Laboratories, Inc., v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), a federal court first held that a disappointed bidder had standing to bring suit alleging the illegal award of a Government contract. However, the same court has strongly suggested that the opinions of the Comptroller General should be accorded great weight in examining such matters. Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971).

CHAPTER ONE

BID RESPONSIVENESS: ROLE AND DEVELOPMENT

Role in Advertised Procurement

Analysis of the concept of responsiveness is enhanced by an understanding of the objectives of advertised procurement. This is because the announced objectives of advertised procurement provide the foundation upon which have been erected the principles utilized to determine the acceptability of a nonconforming bid.

As early as 1829 the Attorney General of the United States indicated that the objectives of advertised procurement were to prevent favoritism and to provide the Government with the benefits of competition.[1] More recently, the Comptroller General has indicated what he views to be the fundamental objectives of advertised procurement by following earlier interpretations and stating:

> The Courts and Accounting Officers of the Government have frequently and consistently held that section 3709, Revised Statutes, was designed to give all persons equal right to compete for Government business, to secure to the Government the benefits which flow from competition, to prevent unjust favoritism by representatives of the Government in making purchases for public account, and to prevent collusion and fraud in procuring supplies or letting contracts.[2]

Both federal[3] and state[4] courts generally agree with the foregoing statement.

The objective of avoiding favoritism is achieved by requiring contracting officials to adopt definite specification requirements so that bids can be accepted without further negotiations with the individual bidders. The contracting official's sole function then becomes to determine the lowest responsible bidder. By restricting the discretion of contracting officials in this manner inconsistent treatment of bidders can be avoided. The goal of competition is achieved by requiring that the advertised specifications apply equally to all prospective bidders in order that a common standard of competition is maintained. At the same time this aids in the achievement of full competition among actual bidders since all compete upon an equal footing.

A requirement of bid responsiveness, while not guaranteeing the realization of the goals of advertised procurement, exists to make those goals capable of attainment. By following such a requirement, competition is preserved by guaranteeing that award is made on the same basis as that solicited from all potential bidders, while at the same time insuring that actual bidders will be competing under the same conditions.

That there should be agreement among federal and state authorities as to the objectives behind advertised procurement is not surprising. What is perhaps surprising is the extent to which a bid may be nonconforming and yet acceptable in federal procurement in light of these objectives.

Historical Development

The origins of the concept of bid responsiveness can be

found in the American system of advertised procurement. It owes neither its creation nor its development to its present form to the English common law. Indeed, England has never utilized advertised procurement to the extent that American governmental agencies have.[1] Its early development in federal procurement can be traced to a handful of decisions by the Attorney General and regulations of the various federal agencies required by statute to make certain purchases through advertising.

Early Statutues Governing Advertised Procurement

While the early statutes concerned with advertised procurement provide the starting place from which to view the development of the concept of bid responsiveness, they alone provide little guidance. The earliest federal statutes governing advertised procurement did little more than emphasize a requirement that it be utilized in the purchase of certain commodities and services. They provided little detail regarding what procedures an agency had to follow when utilizing advertised procurement nor, surprisingly, did they specify that award had to be made to a conforming bid or upon what basis bids should be evaluated. For example, the earliest statute directing that advertising be used for purchases by the Navy, Army and Treasury made no mention of what procedures were to be followed in making an award but simple stated:

> [A]ll purchases and contracts for supplies or services which are, or may, according to law, be

> made by or under the direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, shall be made either by open purchase, or by previously advertising for proposals respecting the same . . . .[1]

Later statutes enacted to require advertising in certain federal purchases were more explicit in setting forth the requirements an agency was required to follow in making those purchases.[13] These statutes also contained within them language which hinted at a requirement that award be made to a responsive bidder. They stated that award would be made to the lowest bid, "[o]ffering to furnish any class of such articles . . . "[14] requested by the Government. This language, however, was removed in later and more significant legislation governing federal purchases. This occured in 1861 when Congress enacted a more far reaching statute which applied to purchases for supplies or services in all departments of Government. As the earliest statutes on advertising, it provided no guidelines and made no mention of any requirement that award be made to a conforming bid.[15]

Agency Regulations

As a result of the broad statutory language of these statutes and their failure to particularize the details which were to be followed, the procuring agencies of the 1800s had wide discretion in both the manner in which they advertised for bids and in the manner in which they evaluated bids and selected a contractor for award.[16] This fact coupled with the fact that there was no forum available in which to contest improper awards[17] and

until 1863 no forum within which to bring suit against the Government for breach of an existing contract[15] meant that the requirement of bid responsiveness and consequently what was an acceptable nonconforming bid was largely the creation of departmental regulations. In addition, upon occasion, the various agencies would seek opinions of the Attorney General regarding procurement matters. These opinions provide some insight into the concept of responsiveness as it existed in federal procurement of that era.

Examination of United States Army regulations controlling the purchase of supplies and services illustrates how at least one agency dealt with the advertising requirements of the 1800s. The Army's earliest regulation concerning purchases by advertising was promulgated in 1825. While limited in detail, it specifically contained within it what can be viewed as a general requirement that bids be upon the same product or service as listed in the invitation when it stated:

> As far as practicable, all supplies and services required in the operations of the quartermaster's department, will be procured by contracts, based upon proposals respecting the same, previously advertised for. When this course is found impracticable, or inconvenient to the public service, those supplies and services will be obtained by open purchase or agreement in the market.[16]

In the regulations of 1857 the requirement of bid responsiveness to the invitation and specifications was indicated by the requirement that, "Contracts will be made to the lowest res-

ponsible bidder, and purchases from the lowest bidder who produces the proper article."[20] By 1867 the Army's Regulations were far more detailed in the requirements they imposed upon purchases and contracts at military posts, but still the requirement for bid responsiveness to the invitation was vaguely stated.[21] The regulations at that time provided that only bids, "in accordance with previous advertisements . . ."[22] would be considered for award. However, the 1867 Regulations, perhaps in recognition that procuring officers had been too strict in rejecting bids that did not fully comply with the invitation, contained within them what may be viewed as the forerunner of the minor informalities and irregularities clauses of the present day procurement regulations. The regulation directed that:

> Slight informalities on the part of the bidder, in complying strictly with the terms of the advertisement, should not necessarily lead to the rejection of the bid made by him, but the interests of the Government should be fully considered in the final award of the contract.[23]

By 1881 the Regulations, while retaining the exception for slight informalities[24] in the exact form as above, directed that "Proposals should be prepared in strict accordance with the requirements made known in the advertisement, or circular of instructions to bidders . . . ."[25]

Early Attorney General Opinions

While the Army's regulations of 1881 were explicit in procedural matters and provided a regulatory basis for the concept

of responsiveness in Army procurements of the day, they failed to specifically address what types of deviations would be considered material and which would have no effect upon a bid's acceptability. In this regard the Attorney General's opinions of the period provide a clearer insight into the degree of conformity required before a bid could qualify for award. These opinions are also useful in that they display how succeeding Attorneys General addressed the issue in different fashions until by the end of the century a general approach appears to have been developed.

Based upon his authority to give his advice and opinion on questions of law,[24] the Attorney General would, when requested by the agencies, render opinions on issues of bid responsiveness. In an early opinion the Attorney General clearly took the position that an award on a basis other than that advertised was impermissible.[25] In response to an inquiry from the Secretary of the Navy as to whether an award could be made to a low bidder where the time of delivery was to be longer than that specified in the advertisement, the Attorney General indicated that such an award would be unlawful. In so doing he stated:

> The obvious purpose of the act in question was to invite competition in the proposals; and it, therefore, requires that the advertisement emanating from the department shall particularize everything that may essentially affect the contract. That the time of delivery may be, in a contract of this description, a material element, the circumstances connected with this case clearly evince. Non constat, if the time had been extended, as now proposed, on the face of the advertisement, that other and lower offers than were received might not have been made. It may well be that a manufacturer may not be in a condition to deliver

> at one time, and yet be fully capable of doing so at another; and that, whilst he would be restrained by this inability from competing for a contract within the time limited by the proposals, he might have successfully done so had the extended time been advertised.[28]

In a subsequent decision, a different Attorney General appeared to modify this position. There he announced that to deny award to a low bidder simply because he offered to complete the contract five days beyond that specified in the invitation would, "[b]e an absurd construction of a statute, the chief object of which is to enable the Government to purchase at the lowest price . . . sacrificing the spirit of the statute." In so holding the Attorney General essentially stated that if the requirement from which the bid deviated was only in the invitation and was not established by statute then it was immaterial and the bid should be accepted.

Ten years later, in 1871, the concept that only a requirement established by statute was material was overturned in one of the Attorney General's most restrictive opinions.[29] In the opinion the Attorney General held that if the invitation established a requirement and specified that no bid would be considered that failed to meet the requirement then any bid deviating from that requirement had to be rejected. Indicating that he was aware that his predecessors had taken a different approach, the Attorney General stated that when the law requires advertising for contracts and award to the lowest bidder, "[i]t must be construed to mean that the lowest responsible bidder, who conforms to the

terms prescribed in the circular . . . . "

Finally, by the end of the century a test appeared to be established. It fell between the extremely loose approach that held that a deviation was material only if it violated a requirement established by statute and the strict test that made any deviation from the instructions in the invitation material. It instead appeared to measure the acceptability of a nonconforming bid upon the basis of whether the deviation affected the cost of the work. In finding the offer of a completion date five months in excess of that specified in the invitation a material deviation the Attorney General announced the test in the following terms:

> The fairness of contracts upon advertisement, specifications, and competition requires that all bidders shall, as to all matters of consequence, those which affect the cost of the work and the amount of expenditure required to be used in performing it, be subject substantially to the same terms and conditions.[12]

This test of materiality, therefore, focused upon whether the deviation permitted the bidder a competitive advantage over other bidders by permitting him to bid on a less expensive basis. Since the opinion found the deviation material based on this test it is not certain whether the Attorney General would have found the bid acceptable had he not felt that there was an impact upon the cost of the work. In a subsequent decision, however, the Attorney General did indicate that literal compliance with an invitation was not required to render a bid acceptable.

Finding the failure to insert on a bid bond the dates of the bid and of the bond to be a waivable defect, the Attorney General emphasized that such defects should be waived in order to secure the advantages of competition which would be lost by observing all formalities.[33]

Early Decisions of the State Courts

As it was developing in federal procurement the concept of bid responsiveness was also being addressed in decisions of the various state courts as they dealt with problems of conformity arising under state and municipal advertising statutes. While the scope of this paper will not permit an in depth examination of these decisions it is important to consider the approach taken by the courts in these early opinions from the standpoint of gaining a perspective on the overall evolution of the concept of bid responsiveness.

In these early decisions the courts clearly embraced a requirement for bid responsiveness, holding that award could only be made to a bid which complied with the terms of the invitation.[34] The requirement for responsiveness was enforced because it was felt that any other rule would result in a violation of the statutory mandate that contracts be let based upon competitive bidding.[35] Decisions held that an offer which failed to conform to the invitation's requirements could not be considered since it constituted a new proposal rather than a bid upon that which was advertised.[36] Such a bid, it was felt, was without

competition with others of the same class and to consider the bid would result in award on a basis other than advertised to all possible bidders.[37] Finally, it was stressed that a failure to conform required rejection since it would mean that bidders would not be competing upon the same basis in fair competition.[38]

The state courts, in these early decisions, as had the Attorney General, recognized a distinction between deviations that required rejection and those that did not. The former were termed substantial variances while the latter were referred to as mere irregularities.[39] While this rule was generally recognized its application was not always clearly defined. Two decisions, for example, illustrate what appears to be two different approaches. In the decision of Case V. Trenton,[40] the New Jersey Court of Errors and Appeals took one approach. There the bidder had failed to submit a bid sample as required by the invitation. In finding the variance substantial, the Court stressed that to permit one bidder to be relieved from conditions imposed by the invitation would mean that award would be based upon conditions not offered to all actual and possible bidders. The fact that the bid was the only bid had no impact upon the Court's finding that the variance required rejection as it stated:

> Nor is the reason for enforcing this rule any the weaker because McGovern remained the only bidder after the exclusion of the Barker Asphalt Paving Company. The ground for enforcing the rule is because no other persons were invited to bid upon the terms which the contract was awarded to McGovern. The presence of the condition may have deterred others from bidding, who would have had they known that these conditions would be waived.[41]

In measuring the extent of acceptability the Court thus focused upon the conditions in the invitation and whether waiver would result in a contract not offered to all potential bidders.

In Pascoe v. Barlum,[42] on the other hand, the Supreme Court of Michigan took a different approach. It found that the offer of a delivery date 15 days beyond that required in the invitation did not constitute a substantial variation. In so holding it focused upon the fact that there was no evidence that would indicate that the deviation permitted the bidder to bid a lower price than the next higher bid. Thus, the Court, rather than examining the requirement to determine if it may have been sufficient to deter potential bidders from bidding, focused upon the impact of the deviation upon competition between actual bidders to determine if the variance was substantial.

As Chapter II of this paper will illustrate these two approaches to measuring the materiality of deviations continue to exist today.

Early Comptroller General Decisions

The role of the Attorney General in addressing issues of bid responsiveness in federal procurement gradually diminished subsequent to the creation of the General Accounting Office in 1921.[43] Through its powers to take exception to accounts of disbursing officers and hold them responsible for unlawful payments,[44] to render advance decisions concerning the propriety of such payments,[45] and to settle all governmental claims and accounts,[46]

the General Accounting Office, presided over by the Comptroller General, has gradually assumed a primary role in determining questions of bid acceptability.[47] Established to fulfill the role of Congress's chief "watchdog" over the disbursement and application of public funds,[48] the General Accounting Office, almost from its inception has been far more active in the area of bid responsiveness than the Attorney General ever was. Moreover, consistent with that role, the Comptroller has not only advised governmental agencies when they might accept a nonconforming bid,[49] but also notified them when they are required to consider such a bid for award.[50] Thus, in federal procurement, an acceptable nonconforming bid is not necessarily synonymous with what would initially be considered acceptable by the procuring agency.

Over the years the Comptroller has developed a highly complex system of rules to be utilized in measuring the materiality of deviations from invitation requirements. This system has evolved and continues to evolve to this day. While subsequent sections of this paper will address the intricacies and evolution of these rules within each major area of bid responsiveness, an awareness of early developments is essential to provide a framework upon which to build subsequent analysis.

While presently the majority of the Comptroller's decisions regarding responsiveness arise out of protests of agency actions by disappointed bidders,[51] the Comptroller's initial decisions resulted from administrative review of agency decisions not to make an award to a low bid.[52] In these early opinions the

Comptroller evidenced a concern that the Government realize the benefits of the lowest bid whenever possible. The focus was not upon whether the deviation disqualified the bid from consideration but upon whether the deviation justified the agency's action in not considering it for award. While the Comptroller indicated that an agency might reject low bids for failing to conform to specified quality requirements,[54] where it was felt that the specifications were overdrawn, exceeding the Government's actual needs, the agency was advised that the low bid should be accepted in spite of its nonconformity.[55] Similarly, when it was felt that the deviation had no impact upon a bidder's commitment to perform in accordance with the specification requirements listed in the invitation the agency was advised that the deviation was an informality.[56] In such a case it was stressed that the interests of the Government required that the bid not be rejected.[57]

During the 1930's, almost imperceptibly, the Comptroller began to alter his approach and a test of materiality began to emerge. A distinction was drawn between deviations which went to the substance of the bid and those which affected simply its form.[58] Decisions resulting in a finding of nonresponsiveness generally involved deviations from specification requirements and those resulting from a bidder's imposition of a condition designed to limit his liability to the Government. Where the deviation had an impact upon specification requirements it was held that it affected the substance of the bid and award was impermissible even if the item offered met the actual needs of the agency.[59]

Where the bidder imposed a condition, not already contained in the invitation, rejection was recommended where the condition had an impact upon contract price or would limit the contractor's liability to the Government. In both situations involving deviations from specifications, and conditioned bids, the Comptroller emphasized the fact that any resultant contract would not be the same as that offered to all bidders.

Where the deviation neither had an impact upon specification requirements nor imposed a condition that would either limit the bidder's liability or affect the price of any subsequent contract, the Comptroller found the deviation immaterial. Unlike decisions involving specification requirements and conditioned bids, which did not specifically address why a deviation went to the substance of a bid, decisions in this area identified characteristics which had to be impacted by the deviation before it would be considered material. In a 1935 decision, for example, the Comptroller stressed that an agency should not reject a bid simply because of a failure to furnish something that was required but did not in any way affect the price or quality of the equipment to be furnished.[12] Subsequent decisions emphasized that if the deviation did not go to the substance of the bid by affecting price, the quantity of items to be procured, the quality of these items, the character of the work to be performed or any terms and conditions of performance, then the deviation was immaterial and the bid should not be rejected.[13]

In a 1946 decision the Comptroller took an interesting approach. While holding that it was impermissible to accept a bid containing a condition imposed by the bidder he indicated that an award could be made if after bid opening the bidder agreed to remove the condition from his bid and accept an award on the basis which was advertised. For ten years this decision permitted agencies to make awards to low bids containing material deviations as long as the bidder agreed to conform after bid opening. In 1950, however, in what can be termed a landmark decision the Comptroller overturned his prior ruling permitting the correction of deviations after bid opening. At the same time he clearly announced one singular test to measure the materiality of all deviations, including those resulting from a failure to meet specification requirements and conditioned bids. In finding that an award was improper because a bid was conditioned upon the use of Government furnished property, took exception to the specification requirements, and failed to comply with delivery requirements, the Comptroller stressed that the deviations went to the substance of the bid since they affected the price, quality and quantity of the articles offered. This basic test of price, quality, and quantity is still followed by the Comptroller. It has, however, been modified and supplemented by additional tests of materiality. Presently, the rule is that a deviation is material if it has more than a trivial effect upon price, quality, quantity, or the delivery terms of the invitation. Subsequent

discussion will consider these modifications in greater detail.

Current Statutory and Regulatory Guidelines

Statutes

Since the late 1940s there has existed a clear legislative mandate that award under advertised procurement be made to a conforming bid. This occurred with the passage of the Armed Services Procurement Act of 1947[7] and the Federal Property and Administrative Services Act of 1949.[8] Both of these acts contain within them language which can be interpreted as providing a statutory basis for a requirement of bid responsiveness. The Armed Services Procurement Act, for example, provided that:

> (b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered . . . .[9]

Read literally this provision would clearly indicate that any bid nonconforming in the slightest respect would have to be rejected as nonresponsive. The legislative history of the Act, however, provides no indication that it was designed to change prior practices of Government officials and the Comptroller General in waiving immaterial deviations in nonconforming bids.[10] Relying upon this fact the Comptroller has taken the position that it has no impact upon the policy and decisions of his office developed prior to its enactment.[11] Consequently, the existing statutes, and their requirement that award be made to bids con-

forming to the invitation, have had no impact upon the development of the concept of responsiveness within the General Accounting Office.

Regulations

Both of the major procurement regulations contain provisions concerning the issue of bid responsiveness. In addressing the subject in general terms they provide:

> To be considered for award, a bid must comply in all material respects with the invitation for bids so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained.[72]

Elsewhere these regulations provide for the rejection of individual bids. In so doing FPR states:

> (a) Any bid which fails to conform to the essential requirements of the invitation for bids, such as specifications, delivery schedule, or permissible alternatives thereto, shall be rejected as nonresponsive.
> (b) Ordinarily, a bid shall be rejected where the bidder imposes conditions which would modify requirements of the invitation for bids or limit his liability to the Government so as to give him an advantage over other bidders.[73]

From the standpoint of measuring the acceptability of nonconforming bids the most significant section of the regulations is that entitled "Minor Irregularities or Informalities in Bids". This phrase has traditionally been utilized to identify the acceptable nonconforming bid in both the regulations[74] and in decisions of the Comptroller.[75] DAR 2-405 and FPR 1-2.405, with minor exceptions, contain similar language in defining a minor irregularity or informality. DAR defines a minor informality in

the following terms:

> A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing, or be otherwise prejudicial to bidders.[74]

The provisions of the regulations largely reflect the tests established by the Comptroller. As the Comptroller has modified his rules, the regulations have generally been altered to reflect those modifications. For example, initially the rule of price, quality and quantity was absolute. Any deviation having any impact on these characteristics was material. The Armed Services Procurement Regulation which proceeded the DAR reflected this.[75] Subsequently, the Comptroller indicated that deviations having only a trivial effect on these three characteristics would not result in nonresponsiveness.[76] The present regulation reflects this position. For this reason, and because the regulations are general in scope, the opinions of the Comptroller take on added significance in determining the materiality of deviations from invitation requirements.

CHAPTER ONE

FOOTNOTES

1. [illegible] Atty. Gen. 257 (1929).

2. [illegible] Comp. Gen. 541, 552 (1955).

3. E.g., United States v. Brookridge Farm, 111 F.2d 461 (10th Cir. 1940).

4. E.g., Webster v. Belote, 103 Fla. 976, 138 So. 721 (1931); Foley Brothers, Inc. v. Marshall, 266 Minn. 259, 123 N.W.2d 387 (1963); Hillside v. Sternin, 25 N.J. 317, 136 A.2d 265 (1957); Delage Farms Construction Co., Inc. v. Lincoln Park, 101 N.J. Super. 367, 391 A.2d 960 (1978).

5. See Collier v. Saint Paul, 223 Minn. 385, 26 N.W.2d 638 (1947) (purpose of requirement of competitive bidding is to divest officials having power to let contracts of discretion in some respects and to limit its exercise in others so as to avoid fraud and favoritism in contracting). In federal procurement it is provided that award may be made based upon price as well as "other factors". DAR 2-407.5; FPR 1-2.407-5. However, the Comptroller General has customarily held that award should be made on the basis of the most favorable cost to the Government. E.g., Ira Lewitt Machine Co., Comp. Gen. Dec B-180990, 74-2 CPD ¶ 271 (1974).

6. 38 Comp. Gen. 532 (1959) (removing subjectivity in making awards to avoid inconsistent treatment of bidders).

7. See Hillside v. Sternin, 25 N.J. 317, 136 A.2d 265 (1957); Albert F. Ruehl Co. v. Bd. of Trustees, 85 N.J. Super. 4, 203 A.2d 410 (1964).

8. See National Engineering & Contracting Co. v. Cleveland, 76 Ohio Misc. 303, 146 N.E.2d 340 (1959).

9. See 49 Comp. Gen. 211 (1969) (to insure the Government the benefits of competition award must be made upon the basis of requirements submitted for competition); 37 Comp. Gen. 110 (1957) (acceptance of bids not complying in substance with advertised specifications would reduce to a farce the procedure of letting public contracts upon a competitive basis); National Engineering & Contracting Co. v. Cleveland, 76 Ohio Misc. 303, 146 N.E.2d 340 (1959) (integrity of competition requires that bidders compete on equal terms). 64 Am. Jur.2d Public Works and Contracts § 58

(1972). (Any other rule would destroy free competition).

10. Mewett, Formalities In Government Contracts, 4 Wayne L. Rev. 303 (1958-59).

11. The earliest statute directing advertised procurement enacted by Congress concerned the postal departments contracting for the transportation of the mails which provided in part:

> That it shall be the duty of the Postmaster General to give public notice in one or more newspapers published at the seat of government of the United States, and in one or more newspapers published in the state or states where the contract is to be performed, for at least six weeks before entering into any contract for the conveyance of the mails that such contract is intended to be made, and the day on which it shall be concluded.

Act of February 20, 1792 §6, 1 Stat. 235 (1792). For a concise history of the Federal statutues governing advertised procurement see McGuire, Public Contracts and Publicity, 28 Georgetown L.J. 779 (1930).

12. Act of March 3, 1809 §5, 2 Stat. 536 (1809).

13. Act of August 26, 1842 §17, 5 Stat. 522 (1842), (Stationary purchases in the Government); Act of March 3, 1843 (Navy purchases in the Navy).

14. Id.

15. Act of March 2, 1861 §10, 12 Stat. 214 (1861).

16. See 21 Op. Atty. Gen. 5 (1897); 15 Op. Atty. Gen. 226 (1877).

17. See note 8 (Introduction), supra.

18. The right to bring suit against the United States for breach of contract was created by what is commonly known as the Tucker Act. Act March 3, 1863, 12 Stat. 765 as amended by the Act of March 3, 1887, 24 Stat. 505, as reenacted by the Act of March 3, 1911, 36 Stat. 1135 now codified as 28 U.S.C. §§1346(2), 1491 (1976).

19. Army Regulation Act. 69 para.987 (1825) (Emphasis supplied).

20. Army Regulation 942 (1857).

21. Army Regulation 1044 (1867) (derived from General Order No. 97, HQRS of the Army, Adjutant General's Office, November 12, 1867).

22. Id. at para IV.

23. Id at para V.

24. Army Regulation 1493, February 17, 1881.

25. Army Regulation 1498, February 17, 1881.

26. 1 Stat. 92 (1789); 16 Stat. 162 (1870).

27. 4 Op. Atty. Gen 334 (1844).

28. Id.

29. 10 Op.Atty, Gen. 140, 143 (1861).

30. 13 Op. Atty Gen. 510 (1871).

31. Id. at 511.

32. 20 Op. Atty, Gen, 496, 499 (1892).

33. 21 Op. Atty. Gen. 469 (1897).

34. E.g. Urbany v. Carroll, 176 Iowa 217, 157 N.W. 852 (1916); Konig v. Baltimore, 126, Md. 606, 95A. 478 (1915); State ex rel. Whedon v. York County, 13 Neb. 57, 12 N.W. 816 (1882); International Motor Co. v. Mayor of Plainfield, 96 N.J.L. 696, 74 A. 672 (1921); Lupfer v. Atlantic County, 87 N.J. Eq. 491, 100 A. 927 (1917); Lake Shore Foundry v. City of Cleveland, 8 Ohio C.C. 671, 4 Ohio C.D. 230 (1894).

35. E.g., Tufano v. Borough of Cliffside Park, 110 N.J.L. 370, 165 A. 628 (1933); Van Reipen v. Mayor of Jersey City, 58 N.J.L. 262, 33 A. 740 (1896).

36. E.g.,Urbany v. Carroll, 176 Iowa 217, 157 N.W. 852; Lupfer v. Atlantic County, 87 N.J. Eq. 491, 100 A. 927 (1917); Case v. Trenton, 76 N.J.L. 696, 74 A. 672 (1909).

37. Lake Shore Foundry v. City of Cleveland, 8 Ohio C.C. 671, 4 Ohio C.D. 230 (1894); International Motor Co. v. Mayor of Plainfield, 96 N.J.L. 696, 74 A. 672 (1921).

38. Tufano v. Borough of Cliffside Park, 110 N.J.L. 370, 165 A. 628 (1933); Case v. Trenton, 76 N.J.L. 696, 74 A. 672 (1909).

39. See, e.g., Urbany v. Carroll, 176 Iowa 217, 157 N.W. 852 (1916)(acknowledging distinction); Pascoe v. Barlum, 247 Mich. 343, 225 N.W. 506 (1929)(variation must be substantial to destroy competitive character of bid); Case v. Trenton, 76 N.J.L. 696, 74 A. 672 (1909)(acknowledging distinction); Faist v. Hoboken, 72 N.J.L. 361, 60 A. 1120 (1905)(mere irregularity not sufficient to require rejection).

40. 76 N.J.L. 696, 74 A. 672 (1909).

41. Id. at 709, 74 A. at 673.

42. 247 Mich. 343, 225 N.W. 506 (1929).

43. The Budget and Accounting Act of 1921, 42 Stat. 23, 31 U.S.C. § 41-44 (1976). For an early commentary on the relative authority of the Comptroller General and the Attorney General see McGuire, The Opinions of the Attorney General and the General Accounting Office, 15 Georgetown L.J. 115 (1929).

44. 31 U.S.C. § 74 (1976); 31 U.S.C. § 514 (1976).

45. 31 U.S.C. § 74 (1976).

46. 31 U.S.C. § 71 (1976).

47. A complete discussion of the operations and authority of the Comptroller General is beyond the scope of this paper. See generally Cibinic & Lasken, supra note 5 (Introduction); Schnitzer, supra note 5 (Introduction).

48. Included among the responsibilities of the Comptroller General is to investigate all matters relating to the receipt, disbursement, and application of public funds and to report to Congress at the beginning of each regular session, or at any other time when Congress is in session, his findings and recommendations with a view towards achieving greater economy in public expenditures. 31 U.S.C. § 53 (a) (1976). See also Meyer, supra note 5 (Introduction) at 41.

49. E.g., 40 Comp. Gen. 469 (1961); Comp. Gen. Dec. B-179024, October 30, 1973, Unpub.

50. E.g., 15 Comp. Gen. 107 (1935); 7 Comp. Gen. 23 (1927).

51. For discussion of the Comptroller General's bid protest procedures see R. Nash & J. Cibinic, supra note 1 (Introduction) at 847; P. Shnitzer, Government Contract Bidding 515 (1976); Tieder & Tracy, Forums and Remedies for Disappointed Bidders on Federal Government Contracts, 10 Pub. Cont. L. J. 92 (1978).

52. The Comptroller General asserted his authority to review such decisions and examine the agency's reasons for making award to other than a low bid in 1924. 3 Comp. Gen. 604 (1924). Shortly thereafter this authority was confirmed in an opinion of the Attorney General. 34 Op. Atty. Gen. 446 (1926).

53. 5 Comp. Gen. 330 (1925).

54. 7 Comp. Gen. 23 (1927). Cf. 5 Comp. Gen. 848 (1926) (acceptance of other than lowest bid not authorized).

55. 7 Comp. Gen. 568 (1928)(failure to submit required bid guarantee).

56. Id. at 569.

57. 20 Comp. Gen. 4 (1940); 17 Comp. Gen. 554 (1937)(recognizing distinction); 16 Comp. Gen. 809 (1937)(submitting guarantee bond in lieu of certified check or U.S. bond considered deviation only in form).

58. 17 Comp. Gen. 554 (1937).

59. 19 Comp. Gen. 614 (1939)(bid providing for increase in price in accordance with minimum prices fixed by state board), 13 Comp. Gen. 169 (1933)(bid conditioned on price increases in event of specified occurrences).

60. E.g., 20 Comp. Gen. 4 (1940)(liability for delays); 19 Comp. Gen. 450 (1939)(liability for delays); 17 Comp. Gen. 864 (1938)(liability for delays).

61. 19 Comp. Gen. 450 (1939); 17 Comp. Gen. 554 (1937); 15 Comp. Gen. 553 (1935).

62. 15 Comp. Gen. 197 (1935)(failure to submit descriptive data).

63. 16 Comp. Gen. 809 (1937); 16 Comp. Gen. 65 (1936).

64. 20 Comp. Gen. 4 (1940).

65. 30 Comp. Gen. 179 (1950).

66. See Bravo Corp., Comp. Gen. Dec. B-191005, 78-1 CPD ¶ 369 (1978); G & H Aircraft, Comp. Gen. Dec. B-189264, 77-2 CPD ¶ 329 (1977). Recent opinions do not always include "delivery" in the statement of the test. E.g., Railroad Builders, Inc., Comp. Gen. Dec. B-189102, 77-2 CPD ¶ 292 (1977). It is clear, however, that a deviation from the delivery requirements in an invitation may result in nonresponsiveness. See text accompanying notes 67-80 (Chapter Three), infra.

67. Pub. L. No. 80-413, 62 Stat. 21 (codified at 10 U.S.C. §§ 2202, 2301-2314, 2381, 2383 (1976)).

68. Pub. L. No. 81-152, 63 Stat. 377 (codified at 40 U.S.C. §§ 471-475, 481, 483, 484-492, 751-758; 41 U.S.C. § 5, 251-255, 257-260; 50 U.S.C. App. §§ 1622, 1641 (1976)).

69. Armed Services Procurement Act of 1947, Pub. L. No. 80-413 § 3(b), 62 Stat. 21. The present provision is substantially the same and appears at 10 U.S.C. § 2305(c)(1976). The applicable provision of the Federal Procurement Act of 1949 is identical. Pub. L. No. 81-152 § 303(b), 63 Stat. 377. It remains unaltered. 41 U.S.C. § 253(b)(1976).

70. Both the debates and the committee reports are devoid of any indication that this provision was designed to alter past practices. 93 Cong. Rec. 2320 (1947); S. Rep. No. 571, 80th Cong., 1st Sess. (1947); H. Rep. No. 109, 80th Cong., 1st Sess. 18 (1947).

71. 31 Comp. Gen. 20, 23 (1951).

72. DAR 2-301(a); FPR 1-2.404-2.

73. FPR 1-2.404-2. The DAR provision is similar. DAR 2-404.2.

74. E.g., ASPR 2-404 (March 1, 1952 ed.).

75. E.g., 53 Comp. Gen. 331 (1973); 51 Comp. Gen. 62 (1971); Mills Manufacturing Corp., Comp. Gen. Dec. B-188672, 77-1 CPD ¶ 430 (1977).

76. DAR 2-405.

77. E.g., 30 Comp. Gen. 179 (1950).

78. ASPR 2-404 (March 1, 1952 ed.).

79. 34 Comp. Gen. 581 (1955)(negligible impact on cost); Comp. Gen. Dec. B-166333, April 23, 1969, Unpub. (recommending ASPR modification to permit acceptance of bids containing deviations having only a trivial impact upon quality and quantity).

CHAPTER TWO

PRINCIPLES UTILIZED TO DETERMINE ACCEPTABILITY

Generally

Having briefly examined the historical background and fundamental basis for a requirement of bid responsiveness, the following sections of this paper will address in greater depth the distinction between the acceptable and unacceptable nonconforming bid. While the goal will be to define that distinction as it exists in federal procurement, in order to further illustrate concepts and principles it has been found necessary to utilize state court decisions. Their use is necessitated both by the fact that the Comptroller General's opinions concerning responsiveness lack extended discussion of the principles underlying determinations of acceptability and because the Comptroller does not observe certain principles that form the basis for decision in many state courts.

Examination of the various decisions concerning responsiveness reveals that three general principles form the foundation for all determinations of the acceptability of nonconforming bids. While in this chapter each of these three principles will be addressed separately, it will become apparent that often in actual practice they become interrelated. Briefly, these principles may be summarized as follows: (1) Preservation of the integrity of the competitive bidding system requires that a nonresponsive bid

not be corrected or waived in order that the bid may be considered for award but instead the bid must be rejected, (2) Any bid deviating from the requirements of the invitation in such a fashion that the bidder may obtain a competitive advantage over other actual bidders must be rejected as nonresponsive; and (3) A nonconforming bid may be considered for award where, in spite of the deviation, the bidder, upon acceptance, would be obligated to perform in accordance with the demands of the invitation.

These three principles can be termed integrity, actual prejudice and obligation. As subsequent pages of this paper will illustrate, the principles of actual prejudice and obligation generally provide the foundation upon which the tests of materiality have been based in federal procurement. On the other hand, the principle of integrity appears not to be a basis upon which to measure responsiveness,but rather a goal to be achieved by following the tests of responsiveness that do exist.

Integrity of the Competitive Bidding System

The primary stated objective in following a requirement of bid responsiveness is to maintain the integrity of the competitive bidding system. Invariably when dealing with matters involving bid responsiveness, the Comptroller General emphasizes this fact. Consistently it is stressed that it is infinitely more in the public interest to maintain the integrity

of the competitive bidding system than to obtain a pecuniary advantage in the particular case by an award to a nonresponsive bid. Just as consistently, however, the Comptroller fails to define what is meant by "integrity" or why certain types of deviations would impinge upon integrity and others not.

Various state courts, however, seem to describe in clearer terms the concept of integrity. The definition they appear to provide may be utilized throughout the remainder of this discussion since arguably the meaning of the word should have no variation simply because the systems of advertised procurement exist in diverse jurisdictions. Basically, these decisions appear to equate integrity with a consistent following of the goals of advertised procurement and a lack of erosion in the fundamental structure of the competitive bidding system. Rather than focusing upon whether the rules of responsiveness have been observed in determining whether integrity is maintained, the focus appears to be upon whether the rules of responsiveness being followed serve to insure absolutely that the objectives of advertised procurement are being fulfilled. The following statement of the Supreme Court of Minnesota aptly illustrates the foregoing:

> Since they are based upon public economy and are of great importance to the taxpayers, laws requiring competitive bidding as a condition precedent to the letting of public contracts ought not to be frittered away by exceptions, but on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose and which will avoid the likelihood of their being circumvented, evaded, or defeated."

Therefore, under this concept of integrity the fact that a waiver of the requirements of bid responsiveness would not be harmful in the particular instance is an insufficient basis to justify acceptance, since ultimately erosion of the system of advertised procurement would result, leading to uncertainty in subsequent procurements.

Earlier in this paper the goals of advertised procurement were discussed. It was indicated that bid responsiveness served to contribute to the attainment of those goals. However, if the rules of bid responsiveness being followed are such that attainment of those goals is potentially inhibited, then arguably true integrity under the foregoing definition cannot be maintained. Moreover, where the rules of bid responsiveness are constantly fluctuating and are applied unevenly erosion of the system is assured. In light of these comments, and prior to proceeding with a study of the principles utilized in determining bid responsiveness, it is helpful to consider the following apparently contradictory statement of the Comptroller:

> The basis for the strict rules governing bid responsiveness is grounded in the need to protect the integrity of the competitive bidding system by assuring that all bidders compete on an equal footing. . . . In most cases, of course, the integrity of the system can be preserved only by strict application of the responsiveness rules. However, in cases where it appeared that acceptance of a deviating bid would result in a contract which would satisfy the Government's actual needs and would not prejudice any other bidder, we permitted acceptance of the bid notwithstanding that the bid was technically nonresponsive . . . since the integrity of the competitive system was not adversely affected thereby.

From this statement it would appear that the Comptroller's concept of integrity focuses,not upon observing the rules of responsiveness,but rather with insuring that the Government meet its actual needs while at the same time no actual bidder is prejudiced. As such, therefore, the Comptroller's concept of "integrity" differs markedly from the definition provided by the state courts.

Absolute Integrity and the "Mirror Image" Test

Principle Explained

If one's definition of "integrity" focuses upon whether the goals of advertised procurement are realized in each procurement then it follows that only deviations which have absolutely no potential for impinging upon these goals are immaterial. Following this approach a standard is applied that is strict to the extent that in order for a bid to be deemed responsive it must virtually mirror the invitation. For the sake of simplicity, therefore, this test can be termed the "mirror image" test. In both discussing and illustrating the application of this test it is necessary to utilize largely state court decisions since the test appears not to have been followed strictly by the Comptroller.

Recognizing that since its inception the basic objectives of advertised procurement have been to insure that the Government obtain the benefits of competition from all who are desirous of rendering services or furnishing supplies to

it and to guarantee the equal treatment, without favoritism, of those who chose to do business with the Government, decisions following this test find any deviation material which might potentially impede upon any of these goals. Illustrative of this approach is the following statement of the Supreme Court of New Jersey:

> Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions which may not under any circumstances be waived.

Decisions following the mirror image test measure the deviation's materiality both in an absolute sense and in a relative sense. Measuring it absolutely the focus is upon whether the deviation altered the common standard of competition by resulting in an award in a class not solicited from all potential bidders. Consequently, part of the mirror image test as it is applied is to focus upon whether the presence of the condition might have deterred prospective bidders from bidding who might have bid had they been aware that the condition would be waived. If so, then it is believed that both the potential bidder and the Government may have been prejudiced. The former by not being able to participate in

the procurement and the latter by not realizing the potential for obtaining a more favorable price by readvertising upon the basis of the requirements as modified. This aspect of the mirror image test can be referred to as potential prejudice since it focuses upon the potential harm to the competitive bidding system caused by accepting a deviating bid and the potential prejudice to prospective bidders and the Government by making an award on a basis other than advertised.

Only through insuring that there is no potential prejudice will it be absolutely certain that advertised procurement's goals of obtaining the most favorable price for the Government and providing all who might desire to compete an opportunity to compete are observed. Applying the potential prejudice test there is no emphasis placed upon the impact the deviation might have had upon the price, quality or quantity of the item being procured. Rather, the focus is upon the requirement itself listed in the invitation. If the requirement may have been sufficient to deter prospective bidders from bidding then any deviation from it is material.

The second aspect of the mirror image test is a more relative test. It focuses upon the manner in which the bid deviates from the requirement and whether by being able to bid in the manner in which he did the bidder was able to obtain a competitive advantage prejudicial to the rights of actual bidders. If the deviation is such that it permitted

the bidder to estimate his bid on a basis different from that of his actual competitors then the deviation is considered material. The focus applying this aspect of the mirror image test is upon the deviation rather than the requirement in the invitation. Where the deviation can be viewed as affecting any tangible quality, such as the price of the item being furnished, thereby potentially providing the bidder a competitive advantage by being able to estimate his bid upon a basis different from that of his competitors, then the deviation is material. Since it focuses upon prejudice to actual bidders it can be termed actual prejudice.

Application of the Potential Prejudice Rule

Recognition of decisions applying the mirror image test is often difficult because of the propensity to apply the actual prejudice test as an initial test of materiality prior to utilizing the potential prejudice rule. In many decisions it is only when the test of actual prejudice fails to result in a finding of materiality that discussion is directed to whether the requirement being waived may have deterred prospective bidders from bidding. Consequently, the only clue to determining whether a decision was decided consistent with the mirror image test is the fact that the decision was resolved on the basis of potential prejudice.

Many decisions concerning bid responsiveness by the Attorney General and several state courts appear to have

been resolved on the basis of potential prejudice. In addition, some decisions of the Comptroller General appear to apply this test, but it has been applied inconsistently with emphasis appearing to be placed on actual prejudice alone.

Concern for assuring full competition by permitting all prospective bidders to compete was evident in some Attorney General opinions of the 19th century. It will be recalled that early in the century the Attorney General stressed that to modify the terms of a contract from those advertised would result in a contract without the benfits of competition from both actual and potential bidders. Later in the century the Attorney General firmly stated, "It is a mockery to invite proposals of a certain sort, and then to reject them for proposals of a different sort, which were uninvited, and the possible acceptance of which could not have been generally anticipated."

The courts of New Jersey have consistently followed a strict test which measures the materiality of deviations both by an actual prejudice and a potential prejudice test. The 1903 decision of Case v. Trenton, already considered, set the trend for the strictness of the state's rules of responsiveness. It will be recalled that in that decision in finding the deviation material the Court pointed both to the fact that the deviation had resulted in unequal competition and that others might have bid had they been aware that the conditions in the invitation would be waived. A subsequent

lower court decision indicated that in determining whether a defect impacted adversely competitive bidding two factors had to be examined: (1) whether the requirement being waived prevented anyone from bidding; and (2) whether all those who did bid did so upon an equal footing.[11] The New Jersey Supreme Court's more recent decision in Hillside v. Sternin[12] clearly illustrates strict application of a potential prejudice test and points out that concern for the integrity of competitive bidding is the basis behind applying such a strict standard. Holding that a bidder's failure to submit a required certified check with his bid as security rendered the bid nonresponsive, the Court focused upon the fact that the presence of the condition may have deterred potential bidders from bidding who may have bid had they known that the condition might have been waived. The Court concluded by stating:

> Examination of all of the authorities to which reference has been made has led us to the conclusion that the efficacy of our competitive bidding statute depends upon its rigorous enforcement. Approval of a relaxation even to the extent sought in this instance would make necessary an evaluation in future cases of sensitive, subtle and subjective criteria, and such a practice does not harmonize with the underlying objective of the legislature. Accordingly, we hold that the defendant's nonconforming bid was not subject to acceptance by the township.[13]

Subsequent decisions of the courts of New Jersey have indicated that a requirement is material and may not be waived when potential bidders may have been discouraged from bidding due to its insertion in the invitation,[14] even in

spite of the fact that actual bidders would not have been prejudiced by an award to a deviating bid. The test in these decisions to measure materiality, therefore, was more than actual prejudice but rather whether award to the deviating bid would have resulted in an award on a standard different from that advertised and therefore resulting in an award without competition from all who may have participated had it been generally known the requirement would be waived.

While theoretically any requirement may be adequate to deter potential bidders, nevertheless, Court's applying the potential prejudice test have found certain deviations immaterial. Recognizing that achieving the goal of economy in public contracting might be unnecessarily frustrated by too strict an application of the rules of responsiveness, some decisions have permitted the waiver of what are termed technical omissions in the form of the bid, apparently in the belief that in so doing there would be no possible frustration of the policies underlying competitive bidding. For example, in one New Jersey decision the submission of a bid bond rather than a required certified check was found to be an immaterial deficiency since it was felt that no one was prevented from bidding and all those who did bid competed upon an equal footing. In a Minnesota decision a condition in a bid that the Government remove competition from a privately owned utility company was deemed a minor irregularity because the franchise was about to expire and the fact was

known to all bidders.

It has been necessary to illustrate the potential prejudice test through a discussion of state decisions primarily because it is difficult to detect its strict application in decisions by the Comptroller. While several of the Comptroller's decisions appear to have been resolved upon the basis that an award to a nonconforming bid would not result in a contract which was offered to all prospective bidders, other decisions decided contemporaneously with these decisions, were decided on a basis inconsistent with the test of potential prejudice. As subsequent sections of this paper will reveal, if any principle is consistently applied by the Comptroller in making decisions of responsiveness it is that of actual prejudice.

A 1938 decision serves both to illustrate the apparent application by the Comptroller of the potential prejudice test while at the same time pointing out his application of strictly an actual prejudice test in other situations. In the decision the Comptroller held that a bid was nonresponsive when it failed to comply with an invitation's requirement that a water escape hole on a water meter be placed in such a manner as to insure against tampering. Rather than appearing to measure the materiality of the deviation on the basis of whether it provided the bidder with a competitive advantage over other actual bidders, the Comptroller seemed to focus upon a need to insure competition and the opportunity for

all prospective bidders to participate when it was stated:

> If it be administratively determined that the needs of the District of Columbia would be best served by meters so equipped, or, . . . that such guards are not needed to provide a sufficient degree of protection from tampering . . . then the proper course is to advertise for such meters on specifications setting forth what is wanted in sufficient detail so that prospective bidders may submit their proposals on an equal footing, or to accept the lowest responsible bid actually meeting the specifications heretofore advertised.

However, in an earlier decision the Comptroller had held that a failure to furnish required descriptive data prior to bid opening did not require rejection. In distinguishing the decisions the Comptroller indicated that the failure to furnish the data prior to opening had no impact upon the price, quantity or quality of the items being procured and therefore the deviation did not go to the substance of the bid. No mention was made of the fact that the requirement to furnish descriptive date may have deterred prospective bidders from bidding. Moreover, as subsequent discussion will reveal the price, quality or quantity test is a test of actual prejudice rather than potential prejudice.

Actual Prejudice

Principle explained

While actual prejudice has been utilized along with potential prejudice in making decisions of materiality it is discussed separately because it appears as if some court decisions have followed this principle solely. More

importantly from the standpoint of federal procurement, it appears that the Comptroller General has built his system of bid responsiveness largely around the concept of actual prejudice and the related principle of obligation. For this reason, to illustrate these principles, decisions of the Comptroller will be utilized to a greater extent than in the previous section.

As applied by the Comptroller, the principle of actual prejudice can be stated as follows: Any bid deviation which if waived might result in a competitive advantage for the bidder submitting the deviating bid, or which if allowed to be corrected after bid opening would result in a situation in which the bidder might be given an opportunity to elect to qualify for award after observing the bids of his competitors, is a material deviation as its acceptance might be prejudicial to the rights of other actual bidders.

When applying the test of actual prejudice the potential for prejudice arises under two diverse situations. The first consists of situations in which the bidder submits a deviating bid and the Government elects to accept the bid in the form submitted. Whether other bidders might be prejudiced by such an action depends upon whether or not they were deprived of being able to compete upon a common basis with the nonconforming bid. The second aspect in which the potential for prejudice presents itself is in those situations in which a bidder is permitted an option to correct his bid deviation after bid opening to conform with the invitation. Under this situation

the potential for prejudice arises because a bidder would obtain a competitive advantage by being able to elect to qualify for an award after observing the bids of his competitors. Decisions of the Comptroller illustrate application of both of these aspects of actual prejudice.

Actual Prejudice and the Rule of Price, Quality, Quantity or Delivery

With regard to the first aspect of actual prejudice, the test utilized in federal procurement to measure materiality has been, as previously indicated, to determine whether deviations from invitation's have more than a trivial effect on price, quality, quantity or delivery of the work required of the bidder. In this regard the Comptroller has stated the following:

> Under an advertised procurement all qualified bidders must be given an equal opportunity to submit bids which are based upon the same specifications, and to have such bids evaluated on the same basis. To the extent that waiver of the provisions of an invitation for bids might result in failure of one or more bidders to attain the equal opportunity to compete on a common basis with other bidders, such provision must be considered mandatory. . . To this end, the decisions of this office have consistently held that where deviations from, or failures to comply with, the provisions of an invitation do not affect the bid price upon which a contract would be based or the quantity or quality of the work required of the bidder in the event he is awarded a contract, a failure to enforce such provision will not infringe upon the rights of other bidders and the failure of a bidder to comply with the provision may be considered as a minor deviation which can be waived and the bid considered responsive.[15]

The test of price, quality, quantity, or delivery can be viewed as following naturally from a test of actual prejudice which focuses exclusively upon whether a bidder obtains a competitive price advantage in submitting a deviating bid. This would appear to be true because it is conceivable that any deviation affecting quantity, quality or delivery would have an impact upon bid price as well.[51] The fact that the price, quality, quantity, or delivery test is one of actual rather than potential prejudice is apparent not only from what the Comptroller states about it, but also from the fact that it focuses upon the impact of the deviation rather than the requirement listed in the invitation to measure materiality. By doing so it is possible to find a deviation immaterial in spite of the fact that the requirement from which it deviates is potentially sufficient to deter prospective bidders from bidding. Where, however, the deviation has an impact upon price, or any other quality which might permit a bidder to obtain a competitive advantage over other bidders by affecting his cost, and thus the amount of his bid, then the deviation is considered material.

Actual Prejudice and the Principle of "Two Bites at the Apple"

Due to a general following of an actual prejudice test through utilization of the price, quality or quantity test, the Comptroller had in the past found certain deviations immaterial because it was felt that the failure to conform

had no impact upon any of these characteristics. Thus, for example, until 1959 the failure to furnish a bid bond was considered to be a minor informality which could be waived. Under a test which measures materiality both by actual prejudice and potential prejudice such a requirement would be material since regardless of a lack of actual prejudice, the requirement may have been sufficient to deter potential bidders from bidding. Since, however, the Comptroller followed an actual prejudice test, it was necessary to devise a test which would enable him to find a deviation material that did not provide a bidder a competitive price advantage while at the same time remain consistent with the actual prejudice principle being followed. Consequently, the Comptroller devised what is generally known as the "two bites at the apple" rule.

This rule addresses the second aspect of the actual prejudice principle and stands for the concept that a bidder is not permitted to correct defects in his bid after bid opening if it might have the effect of placing him in a position of controlling his eligibility for an award. It makes material any deviation having the effect of giving a bidder an opportunity to control his eligibility regardless of its effect on price, quality, quantity or delivery. Examination of the Comptroller's changing view as to the materiality of a failure to furnish a required bid bond both illustrates the development of the rule of "two bites at the

apple" and how the concept of actual prejudice has been used to create an area of materiality.

The early decisions of the Comptroller General concerning the failure to furnish a required bid bond almost uniformly held that a failure to furnish a bid bond or guarantee was not a significant enough deviation to require an automatic finding of nonresponsiveness. It was held that the failure to provide a bid bond was an irregularity which did not require immediate rejection of the bid but which could be explained after bid opening and upon proper facts be waived by the contracting officer in the event it was in the interest of the Government to do so.[40] In announcing the rationale behind following such a rule the Comptroller stated:

> A bid bond is merely a guarantee that in event the bid is accepted the bidder will execute the required contract and furnish the required performance bond, but the failure to submit such a bid bond does not affect the legal obligation that when the bid is accepted there arises a contract binding on the contractor to perform in accordance with the terms of the accepted bid or to pay the United States any damages resulting from failure to do so.[41]

The Comptroller treated the failure to furnish a bid bond in both Government procurements and Government property sales in an equal fashion, often citing in each area decisions rendered in the other as authority.[42] The position taken was that since the failure to furnish a bond had no effect upon the price of the work to be performed it was an informality which could be waived.[43] From the decisions it

appears that it was felt that since the deviation did not affect price, quality, or quantity it was not prejudicial to other bidders to consider such a deviation immaterial." The Comptroller indicated that where the failure to furnish a bid bond was inadvertent due to a bidder's unawareness of the requirement," or because there was insufficient time to obtain a bond, the deviation was immaterial and the bid acceptable. The only real basis for the rejection of a bid submitted without an adequate bid bond was if the defect was due to the bidder's financial inability to qualify for a bid bond." In fact, so relaxed was the rule, that award was permitted even where the bidder had a consistent history of submitting defective bonds or not submitting them at all."

At various times the agencies prevailed upon the Comptroller in an effort to have this rule changed. In 1937 the Secretary of the Treasury made one such effort. In a letter to the Comptroller he pointed out that a particular bidder had consistently failed to accompany his bid with a bid bond and had, in effect, taken the position that based upon the Comptroller General's decisions there existed a legal right to disregard bid guarantee requirements. The Secretary of the Treasury asked if it would be permissible to inform the bidder that any bids he might make in the future without a proper bond would be rejected. In response, the Comptroller indicated that such an action would be impermissible.

The net result of the Comptroller's rule on bid bonds, as it existed at that time, was that after bid opening the Contracting Officer was required to make an investigation as to the causes of a bid's failure to provide a proper guarantee. If investigation showed that the bidder's omission resulted from an oversight or some other excusable cause,as opposed to an inability to obtain a bid bond because of financial status, award could be made where a bond was submitted subsequent to opening.

In 38 Comp. Gen. 532 (1959) the Comptroller General altered his position dramatically, while simultaneously announcing the "two bites at the apple" rule. In the case, the low bidder submitted its bid bond twenty-eight minutes after bid opening. The invitation clearly indicated that bids without bid bonds would be rejected as nonresponsive. As a result, the agency rejected the bid. Relying on the past decisions of the Comptroller, the bidder protested. While finding that under past rules the bid was responsive because the deviation was minor, the Comptroller announced that he would from then onward consider the failure to provide an adequate bid bond a material deviation rendering a bid non-responsive. In explaining the reason for the change the Comptroller stated:

> We have been advised by representatives of the Department that in some areas of procurement, the net effect of this rule has been to make it possible for "fringe" operators to decide after opening, when the bids of more responsible competitors have been

> made known whether or not to attempt to become eligible for award. It is stated that responsible bidders of experience have no fear in submitting their estimates as bids, and that surety companies have no reluctance in guaranteeing such bids. The "fringe" bidder, on the other hand, may have difficulty in obtaining a bid bond unless the surety has some assurance that the amount bid is sufficient to permit the successful execution of the contract. This assurance may come from the knowledge made public at the time of bid opening. Thus, if a "fringe" bidder submits a low bid which is out of line with those submitted by more experienced and responsible bidders, he may be unable to qualify for a bid bond. . . .
>
> It is believed that the effect of the present procedure is to make it possible for some bidders to obtain "two bites at the apple". This is not only unfair to other bidders but . . . contrary to the purposes of statutes governing public procurement. . . .
>
> The net effect of the foregoing would be detrimental to fully responsive and responsible bidders, and could tend to drive them out of competition in those areas where the practices described occur.

That the change was based upon concern for actual prejudice was indicated in a later decision of the Comptroller. In this decision it was stated that a requirement for a bid bond should be strictly enforced unless it clearly appeared that a waiver of the provisions in favor of one bidder would not be prejudicial to the rights of other bidders.

Relative Actual Prejudice

The fact that the Comptroller General has tended to favor a test of actual,as opposed to potential prejudice,is also apparent in several trends and decisions of the recent past. While the final chapter will address many areas in greater detail, it is perhaps helpful to consider some of these trends as a whole, for not only do they serve to demonstrate a propensity to make decisions upon the basis of actual prejudice, but they also serve to point out that in

many situations the Comptroller has failed to follow his own announced test of price, quality, quantity and delivery. Rather than follow this test, which is more absolute in measuring actual prejudice, the Comptroller appears in some decisions to be following a more relative test, examining whether the deviation had a significant impact upon the relative standing of the bidders. Whether these trends represent an overall shift in focus or are limited to their fact patterns cannot be determined, but clearly such a relative test of actual prejudice has broadened the range of acceptability in certain areas.

On some occasions, when all bids have been nonresponsive in the same respect, the Comptroller has permitted the agency to accept a low nonconforming bid in spite of the fact that the deviation might have affected the price of the bid. For example, in one decision the Comptroller found a bid acceptable where a bidder had represented that his prices were based on the rent free use of Government property, but failed to conform with the invitation's requirements that in such cases the bidder furnish evidence at the time of bid opening that it had the right to use such property. The decision was based upon the facts that if the rental for the use of the facilities was added to his bid the bidder would still have been low by more than $1,000,000, and that all other bids had been equally nonresponsive in failing to conform with the invitation's Government furnished property

requirements. Under the circumstances, it was felt that since none of the other bidders would have been prejudiced by acceptance of the bid, the low bidder could receive the award. In another decision, the Comptroller found a bid acceptable even though it failed to comply with the invitation's delivery requirements since all other bids failed to comply in the same respect. The Comptroller advised the agency that under the circumstances it could make award to the most advantageous bid since none of the other bidder's would be prejudiced by acceptance. In these decisions the Comptroller, in effect, found the bids acceptable while at the same time admitting that the deviations were material. In neither case did there appear to be any concern that the Government may have deprived itself of the opportunity to obtain additional competition by not resoliciting bids on the basis which award was eventually made.

In a series of decisions involving option and multiyear bidding the Comptroller has altered his position to one of measuring the acceptability of the bid based upon relative prejudice to other bidders. In both of these situations the invitations have required that each unit price bid on the option or for the multiyear requirements be the same as that bid on the base period. While the general rule is that failure to follow such a requirement renders the bid nonresponsive, starting in 1965 the Comptroller gradually began to focus on whether failure to obey this requirement was

prejudicial to other actual bidders. In that year the Comptroller permitted award to a bidder who violated the invitation by bidding option prices higher than the base price but whose bid was low on both the base and the option prices. Later this decision was relied upon to find a bid acceptable even though the bidder had failed to bid on a multiyear invitation the same unit price on each item for each subsequent year as required by the invitation. Results in these cases clearly indicate that the Comptroller in measuring the materiality of the deviation was strictly concerned with whether other actual bidders were prejudiced by the deviation. It was held that the deviations were immaterial since even if the other bidders had disregarded the bidding instructions their bids would not have been lower than the deviating bid. Since the normal advantage gained by unbalancing such a bid is the opportunity to bid more on the early years, thereby obtaining funds for the entire life of the contract which potentially may be reinvested, it would appear that such a deviation does affect price. Therefore, measuring the materiality of the deviation based upon its impact upon the relative standing of the bidders would appear to violate the price, quality, quantity or delivery test.

The development of the rules regarding the acceptability of a bid which fails to acknowledge an amendment provides a vivid example of a shift towards a more relative test of actual prejudice. Prior to 1955 the

Comptroller followed a strict test when measuring the acceptability of a bid which failed to acknowledge an amendment. Where the bidder failed to acknowledge any amendment which had an effect upon the price, quality or quantity of the work, the failure to acknowledge was considered a material deviation and the bid was rejected as nonresponsive. In 1965 the Comptroller indicated for the first time that if the amendment affected price in but a trivial fashion then the failure to acknowledge the amendment would be considered a minor deviation. At first the Comptroller applied this de minimus rule strictly, looking soley to the amount of the price change, while making no effort to compare the relative significance of the change to the overall cost of the work or the difference between the low and next other bid. Later, in a 1968 decision, the Comptroller indicated concern not only with the absolute value of the change, but also with whether the failure to acknowledge was prejudicial to other bidders.

In 1965 the Comptroller announced a specific test to be utilized in determining whether a failure to acknowledge an amendment was a material deviation. The test was two pronged. First, it was stated that the amendment's impact upon price had to be trivial in itself, but that in no case would a change in excess of $200.00 be considered de minimus. Second, it was announced that the unacknowledged amendment's impact must also be insignificant when compared both to the total cost of the work and the difference between the amount

bid in the low and next higher bid. This rule was followed for eight years. Then in 1973 the Comptroller completed his 180 degree change from the strict application of the price, quality and quantity test he had followed prior to 1955. In a decision that year he dropped the first prong of his earlier test. Finding that the failure to acknowledge an amendment affecting a change in price in the amount of $966.00 was a minor informality he announced:

> [We] do not believe that any specific figure may be determinative without reference to the particular facts. In that connection, it is our view that whether the change effected by the amendment is trivial or negligible in terms of price must be determined in relation to the overall scope of the work and the difference between the low bids.[1]

By following a test that measures the materiality of a deviation in relation to the total cost of the procurement and the difference in bids rather than a strict rule of price, quality or quantity it appears that in this area the Comptroller is following a more relative test of actual prejudice than he once had. At the same time this change represents movement farther away from the principle of potential prejudice.

Obligation

Principle Explained

A further principle which appears to be utilized in determining the acceptability of a nonconforming bid can be termed a principle of obligation. Discussion of this principle appears in many of the Comptroller's decisions. The principle of obligation focuses upon the Government's ability to bind the

bidder upon acceptance to those terms and conditions advertised in the invitation. The principle has been expressed in the following terms:

> Where there is any substantial question as to whether the bidder upon award could be required to perform all of the work called for if he chose not to, the integrity of the competitive bid system requires that the bid be rejected . . . unless the bid otherwise affirmatively indicates that the bidder contemplated performance of the work or the item is not to be awarded.''

The concept of obligation as a principle of acceptability is thus significantly different from the principles of potential prejudice and actual prejudice. While those principles are utilized in measuring whether a deviation is material or immaterial, the obligation principle focuses not upon the materiality of the deviation, but upon whether other actions of the bidder may have overcome the deviation. Consequently, where an obligation to perform in accordance with the invitation is found it does not matter that the bidder's promise or offer was given in a fashion other than that required by the invitation. As the following examples will illustrate, the Comptroller appears to utilize the obligation principle in those situations where the bid as submitted might provide the bidder with an opportunity to "second guess " other bidders after bid opening. Thus, the obligation principle appears to be related to the Comptroller's "two bites at the apple" rule.

Application of the Principle of Obligation

One area in which the Comptroller has utilized the obligation principle is that involving the failure to furnish a bid bond or the furnishing of a defective bid bond. Two cases serve to illustrate how the obligation principle has carved out two exceptions to the general rule which requires rejection for such deficiencies. In one decision the invitation required that each bid be accompanied by a bid bond guaranteeing that the bidder, if successful, would execute a payment bond. While the bid bond submitted by the low bidder failed to furnish such a guarantee it did obligate the surety to indemnify the Government if the bidder failed to enter into a contract "in accordance with its bid." Since the bid was submitted on a bid form that required the bidder to furnish a payment bond, the Comptroller reasoned that there existed an obligation enforceable by the bid bond because the failure to furnish the payment bond would be a failure to enter into a contract "in accordance with its bid." Consequently, the bid was found responsive because the obligation was identical even though the bid bond was defective. In another case, even though a bid bond was not signed, did not bear a corporate seal, and showed the wrong invitation number, the Comptroller found the bid acceptable. This decision was based upon the fact that the bond was submitted with a signed bid which referred to the bond, thus clearly, according to the Comptroller's reasoning, showing an

intent to submit the bond, thereby obligating the bidder to its provisions.

In many decisions involving failures to acknowledge invitation amendments the Comptroller also appears to be applying an obligation principle to determine acceptability. While the general rule is that the failure to acknowledge an amendment affecting a material change results in bid rejection, the Comptroller through a series of decisions has created a significant exception. The exception is termed constructive acknowledgment. It essentially provides that where a bid on its face indicates that the bidder had knowledge of the amendment prior to bid opening he is obligated to comply with the amendment and bound to perform all of its changes. As a result it is felt that he is not presented with an opportunity to disqualify himself after bid opening by arguing that he is not bound to perform in accordnance with the amendment. Applying this principle in one decision, the Comptroller held that a bid was responsive, in spite of a failure to acknowledge a material amendment, since by bidding upon an item which was only listed in the amendment the bidder had constructively acknowledged the amendment. In another decision, where the amendment not only resulted in a material change but also extended the bid opening date, the Comptroller found constructive acknowledgment and an obligation to perform all of the changes in the amendment since the bidder submitted his bid bearing the new bid opening date established

by the amendment.

In certain situations the failure to submit a bid sample as required by the invitation may be a sufficient cause for rejection. However applying the obligation principle, the Comptroller has found such a failure to be an immaterial deviation in certain situations. For example, in one recent decision it was held that since the invitation's specifications adequately set forth the Government's requirements and the bidder had bid in accordance with the specifications he was obligated to perform in accordance with the invitation in spite of his failure to furnish the bid sample.

Decisions involving ambiguous bids further illustrate application of the obligation principle. The general rule followed by the Comptroller is that where a bid, as submitted, is capable of being reasonably understood in more than one possible way then it is considered ambiguous and must be rejected as nonresponsive. The rationale for rejecting such a bid is that since the contracting officer would be forced to inquire after bid opening what the bidder intended the bidder would be provided with an opportunity to modify his bid after opening. Where, however, the bid on its face is capable of but one reasonable interpretation and this interpretation complies with the requirements of the invitation the Comptroller has held that the ambiguity does not require rejection since upon acceptance the bidder would be obligated to perform in accordance with the invitation.

As subsequent discussion will illustrate, the Comptroller often appears to reach quite a distance to find the existence of an obligation. Certainly the mere fact that the Comptroller states that there is or is not an obligation consistent with the terms of the invitation does not mean that automatically the same decision would be reached in any subsequent court proceedings. In many decisions a strong argument could be made that such an obligation did not exist.

57. 44 Comp. Gen. 581 (1965).

58. Keco Industries, Inc., 54 Comp. Gen. 967 (1975).

59. See R. Nash & J. Cibinic, supra note 1 (Introduction) at 473.

60. 33 Comp. Gen. 508 (1954).

61. 34 Comp. Gen. 581 (1955)(impact of amendment found to be between $20.00 and $150.00).

62. 37 Comp. Gen. 785 (1958).

63. 41 Comp. Gen. 550 (1962).

64. 44 Comp. Gen. 753 (1965).

65. 52 Comp. Gen. 544, 545 (1973).

66. 51 Comp. Gen. 543, 547 (1972).

67. 41 Comp. Gen. 585 (1962).

68. Comp. Gen. Dec. B-164453, July 16, 1968, Unpub.

69. 44 Comp. Gen. 753 (1965).

70. See Artisan Inc., Comp. Gen. Dec. B-186601, 76-2 CPD ¶ 132 (1976).

71. Comp. Gen. Dec. B-176462, October 20, 1972, Unpub.

72. 34 Comp. Gen. 581 (1955).

73. Artisan Inc., Comp. Gen. Dec. B-186601, 76-2 CPD ¶ 132 (1976).

74. See text accompanying notes 198-206 (Chapter Three), supra.

75. D.N. Owens Co., Comp. Gen. Dec. B-190749, 78-1 CPD ¶ 66 (1978).

76. Comp. Gen. Dec. B-166603, May 16, 1969, Unpub.

77. 49 Comp. Gen. 764 (1970).

78. The Entwistle Company, Comp. Gen. Dec. B-192990, 79-1 CPD ¶ 112 (1979).

79. See text accompanying notes 307-314 (Chapter three), supra for one court's view of the obligation principle.

CHAPTER THREE

APPLICATION OF THE PRINCIPLES

OF ACCEPTABILITY

The Comptroller General's application of the principles of acceptability has varied depending upon the nature of the requirement from which a bid has deviated. This, in turn, has resulted in the creation of several diverse areas of bid responsiveness. Within each of these areas there has developed an elaborate rule structure to guage the materiality of deviations. This chapter will examine some of the primary areas of bid responsiveness with a view towards both illustrating many of these rules and how these rules relate to the fundamental principles of acceptability. In order to comprehend the application of these principles it is necessary to examine both why bids are acceptable and why they are not.

Bids Altering Invitation Requirements

Offers of Differing Products or Services

Clearly any invitation requirement pertaining to the product or service to be furnished may be sufficient to deter prospective bidders from bidding who might bid on a different product or service. Consequently, an award to a bid offering a product or service deviating from the requirements of the invitation would violate the principle of potential prejudice and the mirror image test. While generally, in this area the Comptroller

CHAPTER TWO

FOOTNOTES

1. E.g., Scott-Griffin, Inc., Comp. Gen. Dec. B-193053, 79-1 CPD ¶ 93 (1979); Burns Electronic Security Services, Inc., Comp. Gen. Dec. B-191312, 79-1 CPD ¶ 1 (1978); Environmental Conditioners, Inc., Comp. Gen. Dec. B-188633, 77-2 CPD ¶ 166 (1977); Davisville Construction Co., Comp. Gen. Dec. B-190080, 77-2 CPD ¶ 456 (1977).

2. Hartwick Construction Corp., Comp. Gen. Dec. B-182841, 75-1 CPD ¶ 118 (1975).

3. E.g., Coller v. Saint Paul, 223 Minn. 385, 26 N.W.2d 340 (1947); Terminal Construction Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 341 A.2d 327 (1975); Hillside v. Sternin, 25 N.J. 317, 136 A.2d 265 (1957); George Harms Construction Co., Inc. v. Lincoln Park, 161 N.J. Super. 367, 391 A.2d 960 (1978).

4. Coller v. Saint Paul, 223 Minn. 376, 386, 26 N.W.2d 336, 341 (1947)(emphasis supplied).

5. See Terminal Construction Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 341 A.2d 327 (1975); Hillside v. Sternin, 25 N.J. 317, 136 A.2d 265 (1957). In Hillside the Supreme Court of New Jersey stated:

> In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way . . . . Only by this approach can the desirable protection be afforded to the taxpayers . . . .

Id. at 329, 136 A.2d at 270. The Comptroller General has also indicated concern that the acceptance of a nonresponsive bid might lead to uncertainty in subsequent procurements. 47 Comp. Gen. 4 (1967).

6. Union Carbide Corp., 56 Comp. Gen. 487, 491 (1977).

7. Hillside v. Sternin, 25 N.J. 317, 136 A.2d 265 (1957); George Harms Construction Co., Inc. v. Lincoln Park, 161 N.J. Super. 367, 391 A.2d 960 (1978).

8. Terminal Construction Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 412, 341 A.2d 327, 331-332

Construction Co., Inc. v. Lincoln Park, 161 N.J. Super. 367, 391 A.2d 960 (1978)(failure to submit stockholder's disclosure statement).

21. L. Pucillo & Sons, Inc. v. Mayor of New Milford, 73 N.J. 349, 375 A.2d 602 (1977); Albert F. Ruehl Co. v. Bd. of Trustees of Schools for Industrial Education, 85 N.J. Super. 4, 203 A.2d 410 (1964). This approach has also been taken by the Supreme Court of Minnesota. Sutton v. St. Paul, 234 Minn. 263, 48 N.W.2d 436 (1951); Coller v. Saint Paul, 223 Minn. 376, 26 N.W.2d 835 (1947).

22. River Vale v. R.J. Longo Construction Co., Inc., 127 N.J. Super. 207, 316 A.2d 737 (1974)(bid bond submitted as security in lieu of certified check); Township of Hanover v. International Fidelity Insurance Co., 122 N.J. Super. 544, 301 A.2d 163 (1973)(bid bond submitted in an amount of $12,000 instead of $13,435 as required by invitation); P. Michelotti & Sons, Inc. v. Borough of Fair Lawn, 56 N.J. Super. 199, 152 A.2d 369 (1959)(uncertified check submitted instead of certified check as required by the invitation).

23. See Terminal Construction Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 341 A.2d 327 (1975).

24. Bryan Construction Co. v. Bd. of Trustees of Montclair, 31 N.J. Super. 200, 106 A.2d 303 (1954).

25. Interstate Power Co. v. Fairbanks, Morse & Co., 194 Minn. 110, 259 N.W. 691 (1935).

26. E.g., 38 Comp. Gen. 131 (1958)(bid conditioned upon receipt of progress payments found nonresponsive since any resulting contract would not be the same as that offered to all bidders on a competitive basis); 37 Comp. Gen. 186 (1957)(bid conditioned on receipt of another contract unacceptable as result of acceptance would be that all prospective bidders were not in a position of equality); 19 Comp. Gen. 450 (1939)(indicating that an award to a conditioned bid results in a contract not offered to all bidders); 13 Comp. Gen. 169 (1933)(stating that bids conditioned upon receiving terms and conditions not offered to all bidders cannot be accepted as resultant contract would incorporate terms not offered as a basis of competition).

27. 17 Comp. Gen. 554 (1938).

28. Id. at 559.

29. 15 Comp. Gen. 107 (1935).

(1975)(emphasis supplied).

9. E.g., Urbany v. Iowa, 176 Iowa 217, 157 N.W. 852 (1916); Hillside v. Sternin, 25 N.J. 317, 136 A.2d 265 (1957); Albert F. Ruehl Co. v. Bd. of Trustees of Schools for Industrial Education, 85 N.J. Super. 4, 203 A.2d 410 (1964); International Motor Co. v. Mayor of Plainfield, 96 N.J.L. 364, 115 A. 391 (1921); Case v. Trenton, 76 N.J.L. 696, 74 A. 672 (1909).

10. E.g., L. Pucillo & Sons, Inc. v. Mayor of New Milford, 73 N.J. 349, 375 A.2d 602 (1977); Terminal Construction Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 341 A.2d 327 (1975); Hillside v. Sternin, 25 N.J. 317, 136 A.2d 265 (1957).

11. E.g., L. Pucillo & Sons, Inc. v. Mayor of New Milford, 73 N.J. 349, 375 A.2d 602 (1977); George Harms Construction Co., Inc. v. Lincoln Park, 161 N.J. Super. 367, 391 A.2d 960 (1978).

12. For examples of decisions in which courts have applied a "mirror image" test while discussing actual prejudice see Coller v. Saint Paul, 223 Minn. 385, 26 N.W.2d 840 (1947); Terminal Construction Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 341 A.2d 327 (1975); Albert F. Ruehl Co. v. Bd. of Trustees of Schools for Industrial Education, 85 N.J. Super. 4, 203 A.2d 410 (1964).

13. E.g., Sutton v. St. Paul, 234 Minn. 263, 48 N.W.2d 436 (1951); L. Pucillo & Sons, Inc. v. Mayor of New Milford, 73 N.J. 349, 375 A.2d 602 (1977).

14. 4 Op. Atty. Gen. 334 (1844).

15. 13 Op. Atty. Gen. 510, 511 (1871)(emphasis supplied).

16. 76 N.J.L. 696, 74 A. 672 (1909).

17. Bryan Construction Co. v. Montclair Bd. of Trustees, 36 N.J. Super. 200, 106 A.2d 303 (1954).

18. 25 N.J. 317, 136 A.2d 265 (1957).

19. Id. at 329, 136 A.2d at 271.

20. E.g., L. Pucillo & Sons, Inc. v. Mayor of New Milford, 73 N.J. 349, 375 A.2d 602 (1977)(failure to submit bids on all required options found to constitute material deviation since requirement may have deterred prospective bidders from competing); Terminal Construction Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 344 A.2d 327 (1975)(failure to present approved affirmative action plan as required by invitation); George Harms

30. 17 Comp. Gen. 554, 558 (1938).

31. E.g., Darin & Armstrong, Inc. v. United States Environmental Protection Agency, Region V, 431 F. Supp. 456 (N.D. Ohio, E.D. 1976); North Construction Co. v. Mayo, 432 F. Supp. 722 (W.D. Mich. 1975); King v. Alaska State Housing Authority, 512 P.2d 887 (Alaska 1973); Bader v. Sharp, 35 Del. Ch. 57, 110 A.2d 300 (1954), aff'd, 36 Del. Ch. 89, 125 A.2d 499 (1955); Bd. of Education of Carroll County v. Allender, 206 Md. 446, 112 A.2d 453 (1955).

32. 41 Comp. Gen. 289, 292 (1961).

33. 38 Comp. Gen. 539 (1959); 34 Comp. Gen. 24 (1954); 30 Comp. Gen. 179 (1950).

34. Initially the test was one of simply price, quality and quantity. 30 Comp. Gen. 179 (1950). Presently the test includes deviations having an impact on delivery requirements. DAR 2-405; FPR 1-2.405.

35. 40 Comp. Gen. 321, 324 (1960).

36. The Comptroller appears to recognize that these four basic areas are interrelated. Comp. Gen. Dec. B-166333, April 23, 1969, Unpub. (indicating that it is inconceivable that a deviation could have a trivial effect solely on price and not quality).

37. E.g., 41 Comp. Gen. 289 (1961). The Comptroller seldom discusses why the acceptance of a bid containing these deviations would be prejudicial to other bidders. For a clearer explanation of the principle of actual prejudice and why deviations impacting the price of a bid are material see 20 Op. Atty. Gen. 496 (1892)(fairness of competition requires that bidders be subject to the same terms and conditions as to matters affecting the amount of expenditure required to be used in performing the contract); King v. Alaska State Housing Authority, 512 P.2d 887 (Alaska 1973)(to be material a variance must result in a bidder's ability to bid on an unequal basis); Bader v. Sharp, 35 Del. Ch. 57, 110 A.2d 300 (1954), aff'd, 36 Del. Ch. 89, 125 A.2d 499 (1954)(to be material a deviation must relate to an element considered in fixing the amount of the bid so as to provide the bidder with an advantage in competition); Pascoe v. Barlum, 247 Mich. 333, 225 N.W.2d 506 (1929)(actual prejudice exists when deviation affects amount of bid thereby providing a bidder and advantage not allowed to other bidders); Albert F. Ruehl Co. v. Bd. of Trustees for Industrial Educ., 85 N.J. Super. 4, 203 A.2d 419 (1964)(competitive advantage arises when bid deviation permits bidder to avoid expenses others would have to incur).

38. 16 Comp. Gen. 65 (1936)(failure to submit bid sample); 15 Comp. Gen. 107 (1935)(failure to furnish descriptive data); 14 Comp. Gen. 305 (1934)(failure to submit bid bond).

39. The Comptroller first took the position that the failure to submit a bid bond was an immaterial deviation in a decision in 1928. 7 Comp. Gen. 568 (1928).

40. E.g., Hillside v. Sternin, 25 N.J. 317, 136 A.2d 265 (1957)(holding that the failure to furnish a certified check as bid security constituted a material deviation as inter alia the requirement may have been sufficient to deter prospective bidders from bidding).

41. 16 Comp. Gen. 493 (1936); 14 Comp. Gen. 305 (1934); 7 Comp. Gen. 568 (1928).

42. 7 Comp. Gen. 568 (1928).

43. 14 Comp. Gen. 305, 308 (1934).

44. E.g., 38 Comp. Gen. 532 (1959)(procurement decision citing to decisions involving Government sales); 26 Comp. Gen. 49 (1946)(sales decision citing to decisions involving Government procurements).

45. 26 Comp. Gen. 49 (1946).

46. 37 Comp. Gen. 293 (1957).

47. 7 Comp. Gen. 568 (1928).

48. 31 Comp. Gen. 20 (1951).

49. 16 Comp. Gen. 493 (1936).

50. Id.

51. 31 Comp. Gen. 20 (1951).

52. 38 Comp. Gen. 532, 535-536 (1959).

53. 43 Comp. Gen. 268, 270 (1963).

54. 45 Comp. Gen. 849 (1966).

55. 40 Comp. Gen. 279 (1960). See also 34 Comp. Gen. 364 (1955).

56. ABL General Systems Corp., 54 Comp. Gen. 476 (1974).

General has found bids unacceptable where they have deviated from specification requirements, the basis for decision has been actual rather than potential prejudice. This fact is apparent both from decisions in which deviating bids have been found acceptable and in decisions in which the Comptroller has indicated that award was impermissible.

Both major procurement regulations contain provisions addressing these types of deviations. DAR 2-404.2(b), for example, provides for the rejection of any bid that does not conform to the specifications contained in the invitation. While this section appears to establish a virtual mirror image test for measuring materiality, when it is read in conjunction with the minor irregularities and informalities section of the regulations, which establish a price, quality, quantity or delivery test for measuring materiality, there would appear to be some room for permissible variance.

Agency Discretion

What stands out most clearly in this area is the extent to which the Comptroller appears to defer to decisions of the contracting officer and agency technical personnel relating to the materiality of deviations. From a pragmatic point of view this would appear to be understandable since the agency is best able to determine what its needs are and because the agency possesses the technical expertise to determine the impact of the deviation. On the other hand, such a position would appear to be contrary to advertised procurement's objective of avoiding the potential

for favoritism by curtailing the discretion of public officials charged with the duty to award public contracts. In either event, the Comptroller has enunciated the rationale for this deference in the following terms:

> Clearly, the distinction between minor and material variances must depend not only upon the type of equipment being procured but also upon the circumstances in which the equipment will be utilized, including such considerations as the importance of continuous operation, the availability of spare parts and maintenance services, and similar factors. Since this information is peculiarly within the knowledge of the administrative agency, it is proper that the officials of that agency, should exercise a reasonable degree of discretion in determining what is minor and what is not.[3]

Thus, while a contracting officer's discretion to make an award to a nonresponsive bid is limited, his decision in determining whether a particular deviation from the specifications is material is accorded great weight by the Comptroller. Moreover, support for the opinions of agency technical experts has been shown as long as the opinions seemed reasonable in spite of the fact that divergent opinions of technical experts were brought to the Comptroller's attention.[4]

This announced policy of deferring to agency decisions regarding materiality can be viewed as creating a presumption that the deviation is or is not material depending upon the agency's position. The Comptroller has indicated that an agency's decision when the determination involves technical or scientific factors will not be overturned unless the protestor can establish by clear and convincing evidence that the agency

erred, that the actions of the contracting officer were arbitrary and capricious or that there was a violation of the procurement statutes and regulations.

Agency Election not to Award

Where the agency has found the bid unacceptable, indicating that certain specification requirements were essential, the Comptroller has generally upheld the agency's determination and in many decisions found the bid nonresponsive without discussion of the deviation's impact upon price, quality, quantity or delivery. Where the requirement has been essential to the agency any deviation from it has been sufficient to render the bid nonresponsive even where it appeared that the deviation had but a trivial effect on price, quality, quantity or delivery.

One confusing aspect of the Comptroller's decisions supporting an agency's determination to reject a bid is created by the fact that in other decisions the Comptroller has focused upon the effect of the deviation upon price or quality.[1] In one procurement, for example, the Comptroller concurred in an agency's determination that a deviation was material where the bid offered paper from a single sheet of paper instead of white wove paper, since it was felt that the deviation had a direct effect upon the quality of the product.[2] In another case the Comptroller found a bid nonresponsive where it offered a product in container sizes larger than those required since it was felt that this manner of performance cost less and would provide the bidder a competitive

advantage.[12] The conclusion to be drawn from these decisions is that when affirming an agency's decision to reject a bid offering a nonconforming product the Comptroller will apply the price, quality, quantity or delivery test when the deviation has an obvious impact upon one of these characteristics. Absent such an impact, the decision will be based upon the fact that the requirement is essential to the agency's needs.

Award to a Nonconforming Bid

Where the agency has elected to make an award to a nonconforming bid the Comptroller has applied the test of price, quality, quantity or delivery in measuring the materiality of the deviations. When it has been determined that the deviation had no impact upon any of these characteristics the Comptroller has upheld the agency's decision to accept the deviating bid.[13] On the other hand, where it has been felt that the deviation had an impact upon price or quality, the Comptroller has found the deviation material.[14] One such case involved the solicitation of bids to furnish a plant growth chamber complex. The specifications required that the internal chamber dimension be no less than 8 feet wide while the low bid offered a chamber 6 inches less in width. In finding the award improper, the Comptroller held that the deviation was material because it affected the quality and price of the item being procured.[15] In another decision, the Comptroller overturned an award where a bidder offered a paper cutter that failed to conform to various dimension requirements listed in the invitation. In so doing the

Comptroller emphasized the fact that the deviation permitted the bidder a cost savings in preparing his bid since the item he offered was less expensive to manufacture. Under those circumstances it was felt that the bidders were not competing upon an equal footing.[16]

While such decisions are not inconsistent with a mirror image test since they apply an actual prejudice principle to find nonconforming bids unacceptable, other decisions indicate that in the absence of actual prejudice the Comptroller will find a nonconforming bid acceptable as long as it appears that it will meet the Government's essential requirements. These decisions establish that actual prejudice has been the exclusive test used to measure materiality. Illustrative of this fact are decisions in which the Comptroller has found bids offering nonconforming products acceptable where it appeared that the product offered exceeded the requirements listed in the invitation.[17] In one decision an agency was advised that they were in error to reject a bid offering cream in 1/2 pint containers rather than the required pint containers. The basis for decision was that 1/2 pint containers were not essential to the Government and that they were more or less than the pint containers. As a result, it was felt that the bidder had not obtained a competitive advantage over other bidders.[18]

A more recent decision confirms that the Comptroller's test of materiality in this area has been actual prejudice. It also illustrates that there has been a concern that the Govern-

ment's essential requirements be met at the lowest price regardless of nonconformity. The decision involved the procurement of a large roll flatwork ironer. The invitation required that the ironer have a hand crank to permit the machine to operate in reverse. While the low bidder offered a product without a hand-crank, based upon the facts that the agency indicated that the requirement was nonessential and that the failure to offer the hand crank had a "de minimus" effect on price and quality, the Comptroller held that the low bid could be accepted in spite of its nonconformity.

Conditioned and Contingent Bids

Occasionally a bidder will condition his bid in some manner thereby altering the requirements of the invitation or limiting the rights of the Government. In other situations a bid may be submitted imposing contingencies which should they arise will alter the legal relationship of the parties to the contract. The Comptroller has almost uniformly held that these types of deviations are material and that bids containing such conditions or contingencies are nonresponsive.

This area represents one of the most difficult areas in which to determine exactly what principle of responsiveness is being applied. Since the vast majority of these conditioned bids, if accepted, would impinge upon the legal rights of the Government, the agencies have generally rejected the bids and the Comptroller renders his decisions based upon the disqualified bidder's protest. In rendering decisions in this area the

language used by the Comptroller to justify a finding of non-responsiveness further confuses the situation. For example, the Comptroller has indicated that such bids must be rejected because: the condition would give a bidder an advantage over other bidders;[1] any resulting contract would not be on the same terms offered to all bidders;[2] the condition may have an impact on the price of the bid;[3] the condition would modify the legal obligations of the parties;[4] or because the condition would make it impossible to evaluate the bid.[5]

Unacceptable Conditioned Bids

Among those situations in which bids have been found non-responsive as a result of the imposition of conditions or contingencies are the following: (1) Bids imposing conditions freeing the bidder from liability for delays occasioned by certain occurrences;[6] (2) Bids imposing conditions freeing the bidder from liability for specific occurrences;[7] (3) Bids conditioned upon the use of Government property;[8] (4) Bids conditioning performance upon some contingency within the control of the bidder;[9] (5) Bids conditioned upon payment of interest on invoices not paid by the Government within a specified time period;[10] (6) Bids imposing conditions restricting the Government's flexibility in ordering its requirements;[11] (7) Bids imposing conditions upon the public disclosure of information contained within them;[12] and (8) Bids conditioned upon the receipt of progress payments.[13]

From the language in many of these decisions it appears

that the Comptroller has focused upon actual prejudice in determining whether such a condition would constitute a material deviation. In so doing, materiality has been determined both by whether the deviation had an impact upon price, and, if not, whether it permitted the bidder "two bites at the apple" by having an impact upon the legal obligations of the Government, thus requiring that the conditions be deleted prior to entering into any contract. For example, in one decision the Comptroller upheld the rejection of a bid conditioned upon the receipt of interest on past due accounts. The basis for decision was that acceptance would be prejudicial to other bidder, because the condition had an impact upon price. In another decision, a bid was found nonresponsive where the bidder conditioned the start of performance upon the receipt of materials, while the invitation required that work would commence within 15 days. It was held that the requirement in the invitation was essential and to provide the bidder an opportunity to conform after bid opening would enable him to make a "second bid".

In one of the few decisions in which an agency has made an award to a conditioned bid the Comptroller took the position that the condition qualified the bidder's obligation to perform since the condition required that there exist certain physical characteristics on the job site. While not mentioned in the decision it would seem that actual prejudice was the underlying basis for decision since by not being obligated to perform absent the ful-

fillment of the condition the bidder would have had an opportunity to qualify or disqualify himself after bid opening.

Acceptable Conditioned Bids

While the vast majority of conditioned bids have been unacceptable, in a few situations bids imposing conditions have been found acceptable. In most cases the Comptroller has found bids conditioning price upon future events nonresponsive. Where, however, it appeared possible to determine what the maximum cost to the Government would have been were the condition to arise bids were found responsive and the Comptroller permitted evaluation on the basis of the maximum price the Government might have conceivably had to pay.

The Comptroller has also found conditioned bids acceptable when the condition imposed appeared to be in accordance with clauses already included in the invitation. For example, while it has been held impermissible for a bidder to submit a bid which frees him from liability for certain delays, the Comptroller has held that such a condition will not render a bid nonresponsive where the invitation contains a general clause that provides for the same release from liability. Where the condition is not identical to that already provided in the invitation, however, the bid has been found nonresponsive.

One type of conditioned bid which the Comptroller has uniformly found acceptable is the "all or none" bid. It has consistently been held that a bid conditioned on the receipt of all,

or a specified group of items included in an invitation is responsive, and may be considered for award even though the invitation is silent regarding the acceptability of such bids. Thus, where an invitation has permitted multiple awards an "all or none" bid lower in the aggregate than a combination of individual bids has been found acceptable even though a partial award could be made at a lower cost. Permitting this type of conditioned bid is clearly based upon the Comptroller's concern that the Government obtain the lowest price for the purchase of products and services. This concern is evidenced by the fact that the Comptroller has held that invitation restrictions prohibiting "all or none" bids are overly restrictive since they inhibit competition and that such restrictions are only appropriate when some items would have to be awarded at an unreasonable price.

In some cases bidders have bid unit prices conditioned upon being awarded the total requirement and reserved the right to quote a revised unit price should they receive an award for less than the total requirement. The Comptroller has viewed such conditioned bids as nothing more than bids containing "all or none" qualifications and has permitted an award for the total requirement based upon the total price bid on all requirements.

Absent an invitation provision specifically permitting such a bid, it would appear that the acceptance of a bid conditioned upon an "all or none" award would violate the principle of potential prejudice since award is made on a basis other

than advertised to all potential bidders. The principle of actual prejudice might also be violated since the bidder may be able to bid a lower aggregate price knowing that he would not be responsible for a partial award. The Comptroller's position in this record has been that bidders should be on notice that "all or none" bids are acceptable simply because they are not prohibited by an invitation and because the invitation solicits bids for all items. This logic would appear contradictory to the general principle requiring that the Government clearly state in the invitation what its requirements are and the basis upon which award is to be made so that all bidders may compete upon equal terms.

Altering the Government's Acceptance Period

In Government contracting for the Government's acceptance to be binding upon a bidder it must occur within the time specified in the bidder's offer. For this reason it is customary for the Government to specify in the invitation a minimum period it must provide for acceptance. Where a bidder fails to offer such a minimum acceptance period the general rule has been that the bid must be rejected as nonresponsive. The Comptroller's decisions in this area clearly indicate that the underlying basis for determinations of responsiveness has been actual prejudice. More specifically, it appears that the Comptroller has found such bids nonresponsive because offering a shorter acceptance period might provide a bidder with "two bites at the apple".

Prior to the development of the rule against "two bites at the apple" the Comptroller appeared to take the position that

offering a shorter acceptance period than required was an immaterial deviation which did not render a bid nonresponsive. In a 1935 decision, for example, where an invitation specified a 60 day acceptance period and the bidder allowed but 15 days the Comptroller, while finding the bid nonresponsive for other reasons, indicated that the failure to provide a 60 day acceptance period was an insignificant qualification since it would still provide the government with ample time to respond.

However, where a bidder limits his bid acceptance period to less than that required in the invitation he does obtain the potential for a competitive advantage over other bidders. After bids are opened he may be given the opportunity to remain eligible by extending his acceptance period or to disqualify himself by refusing to extend the bid acceptance period. The present position of the Comptroller, in response to concern for the potential prejudicial effect of such bids, has altered significantly from that once taken. In more recent decisions the Comptroller has consistently held that a provision in an invitation which requires that a bid remain available for Government acceptance for a prescribed period of time is an essential requirement and that failure to meet such a requirement renders a bid nonresponsive. This general rule has been utilized to find bids offering an insufficient acceptance period nonresponsive even when the failure to provide the required acceptance period was due to inadvertence and done in good faith, or due to difficulty in locating the invitation's provisions, and even where immediately after bid

opening the bidder altered his bid acceptance period to conform with the invitation.

In certain situations, however, a bidder's failure to affirmatively provide the required acceptance period has been held to be an immaterial deviation. In one decision, applying the principle of obligation, the Comptroller found that a bidder's failure to fill in the invitation's blank in which bidders were required to indicate their bid acceptance period did not render a bid nonresponsive even though the invitation provided that bids offering less than 60 days for acceptance would be nonresponsive. The result was based upon the fact that the invitation also provided that 60 days would be considered the period offered if the bidder failed to insert a bid acceptance period in the blank provided. Consequently, it was felt that it was clear that the bidder intended to offer a 60 day acceptance period by leaving the blank open. In another decision, however, where the invitation required a 90 day acceptance period an agency was prohibited from making award where the bidder failed to fill in the blank provided since the invitation established that a failure to insert a bid acceptance period would result in an offer of 60 days.

The fact that the Comptroller has been primarily concerned with actual rather than potential prejudice was illustrated in another decision where all bidders under the household goods portion of an invitation failed to offer an adequate acceptance period. In determining that the resultant contract did not have to be terminated, the Comptroller emphasized that since all of the

bids contained the same defect, no bidder was prejudiced by the awards which were made.

Delivery Schedule Requirements

Generally, where an invitation requires that delivery be made within a prescribed period of time a failure to offer delivery within that period is considered a material deviation which will require rejection of the bid as nonresponsive. The Comptroller's current position regarding the materiality of delivery schedule requirements has been formulated based upon the realization that a failure to comply with a delivery requirement potentially impacts price and acceptance based upon a bid deviating in such a fashion could be prejudicial to other actual bidders. This evaluation has been articulated by the Comptroller in the following fashion:

> While the contracting officer may waive informalities in bids, this authority does not extend to the waiver of material variations to the terms and conditions of the invitation. Award a contract to a low bidder without regard to the terms and conditions of delivery advertised would discriminate against other bidders who may well have included overtime pay and other additional costs in order to meet the deadline. A provision of an invitation which on its face establishes a definite requirement as to time of delivery is material.[7]

While acceptance of a bid which alters the delivery requirements of an invitation would appear to violate both the principles of potential and actual prejudice, the Comptroller appears solely concerned with actual prejudice. This has been made apparent by the fact that on at least two occasions the Comptroller has indicated that a bid failing to comply with an invita-

tion's delivery requirement might be accepted where all other bids also failed to meet the delivery requirement. With the exception of situations where all bids have been nonresponsive, nonconformity has generally resulted in a finding of nonresponsiveness. There are, however, certain exceptional situations that have arisen and in approaching the issue of acceptability in these situations the Comptroller has devised some rather unique methods of measuring bid acceptability.

Desired and Approximate Delivery Dates

In determining whether a bid offering a delivery date other than that specified in the invitation is acceptable the most significant consideration is the language of the invitation itself. Where an invitation has clearly required delivery within a stated period, the Comptroller has regarded time to be of the essence and found a nonconforming bid unacceptable in spite of the fact that the invitation did not expressly state that time was of the essence. On the other hand, nonconfirming bids have been found acceptable where an invitation has stated the requirement in a less definite fashion. For example, where an invitation has expressed only a "desired" delivery date the Comptroller has found bids acceptable as long as they offered a delivery date which was within a reasonable period of the desired date. Since the invitation did not specifically require a certain date, applying a "reasonableness test" in measuring acceptability would not appear to violate any of the fundamental principles of responsiveness.

The Comptroller, however, has taken this same "reasonable-

ness test" and applied it to situations where the invitation has clearly specified a required delivery date and it was uncertain whether the bidder was offering to comply. This has occurred in situations where, rather than offer a specific delivery date, the bidder has offered an "approximate date". In such case the Comptroller has found the bid acceptable where it was felt that the period between the required and approximate dates was great enough to remove any doubt concerning the bidder's obligation to deliver within the required period. Just what the Comptroller would view as a sufficient period to create that obligation is uncertain, although in two decisions some guidance has been provided. In one decision the Comptroller found that an offer of delivery "approximately 120 days (as requested)" was nonresponsive to an invitation seeking a desired delivery within 120 days with a required delivery within 150 days. In the case the Comptroller indicated that he would view any bid offering such an ambiguous delivery date as nonresponsive, since to permit acceptance of such bids might lead to uneven results and unpredictable treatment of bidders. In a later decision, however, the Comptroller found a bid offering to deliver certain data within "approximately 30 days" responsive to an invitation that required delivery within 99 days.[23] While he distinguished the two decisions on their facts, indicating that his later ruling was based upon the fact that the "approximate" period of offered delivery was significantly greater in terms of both absolute number of days between the approximate date and the deadline and the relative periods involved than in

the previous case, the later opinion seemed more to represent a fundamental change in position. In the later decision the Comptroller clearly adopted a position which in the earlier decision had been disfavored, that of utilizing a "reasonableness test" to measure whether the approximate date offered would fall within the required date. Whether a bidder who offers an "approximate" date would be obligated to meet a required delivery date is debatable. It seems that what the Comptroller is actually doing is relying upon the fact that the "approximate" date is so far within the required date that the bidder would actually comply.

Series of Delivery Dates

Where an invitation has specified a series of delivery dates for partial quantities of a total procurement bids have been found responsive where they did not offer to meet all of those dates, even though they offered to provide delivery of the total within the time specified. For example, in one case, a bid was found responsive where it stated that delivery of the first 100 units of a total quantity of 271 would be made within 90 days in response to an invitation that required that a minimum of 100 units would be delivered within 30 days of notice of award. This finding was made in spite of the fact that the bidder agreed to furnish the total called for within the same period as that required in the invitation.[...] Even though a bid does not offer to meet all required delivery dates, the Comptroller has permitted an award for those quantities that are offered in compliance with one or more of the required delivery dates. This has occurred in two

cases where the invitation permitted bids for quantities less than the total amount specified. In these cases the Comptroller took the position that the bids were responsive since, in effect, they were bids on partial quantities of the invitation's schedule.[75]

Offered Period of Delivery Measured from Alternate Date

Another basis for a finding of nonresponsiveness in the area of delivery requirements has arisen when, apparently inadvertently, a bidder has offered delivery in the required number of days but has measured the number of days from a point later in time than does the invitation. Where, for example, an invitation has required delivery within a specified number of days after the date of the contract or date of award, bids offering to provide delivery within the specified number of days but measured from the date of receiving an order[76] or receiving the contract[77] have been found unacceptable. The Comptroller has taken the position that the "date of contract" (or award) and the "date of receipt of contract" (or award) and "date of receipt of contract" (or award) are not synonomous and, therefore, the bid does not comply with the delivery requirements.[78]

An exception to this rule has developed. Where the bid, while measuring delivery from a later period than in the invitation, offers a sufficiently shorter period of delivery to compensate for the different measuring date, the bid has been found acceptable. Thus, where an invitation required delivery within 60 days after the date of award and the bid offered delivery 45 days after receipt of the contract the Comptroller found the bid responsive.[79] In such situations the maximum number of days

required for delivery of the award through the mails has been added to the required delivery schedule and if the total exceeded the number of days computed from the date of award the bid was found nonresponsive.[80]

While not clear from the decisions, seemingly this approach to measuring materiality is based upon the principle of obligation. The difficulty with this approach, however, is that at the time of bid opening the bidder has not offered to meet the required delivery date. It would appear that only if he agrees after bid opening to modify his bid or that the agency provides him with actual notice of award in sufficient time so that his offered delivery falls within the required date would he be obligated to conform. In either case that obligation would arise solely from events subsequent to bid opening. The Comptroller's approach seems based more upon pragmatism than any theory of responsiveness.

Accelerated Delivery Date

There is some question regarding whether the Comptroller will find a bid unacceptable where it offers a delivery date earlier than a minimum delivery date specified in the invitation. This uncertainty has been created by the Comptroller's decision in the only case where the issue has been addressed. In the case the invitation required a minimum of 365 days between the Government's approval of the first article test report and delivery of the first production unit. The low bid provided for delivery 90 days sooner than the required 365 days. Initially, the Comptroller found the

bid nonresponsive for failing to comply with the delivery requirements and directed that the agency terminate the contract. In a subsequent opinion, however, the Comptroller reconsidered the matter and indicated that the agency could retain the contract.[a] At the same time, however, it was reiterated that the bid was nonresponsive but that termination was not required because it appeared that the bidder had not obtained a competitive price advantage by offering an accelerated delivery schedule. In making this determination the Comptroller did not focus upon the facts in the case but clearly took the position that award to a bid offering an accelerated delivery schedule would not under any circumstances be prejudicial to other bidders.

Consequently, while the narrow holding of the decision is that termination of a contract based upon a bid offering an accelerated delivery will not be required absent actual prejudice, it is uncertain that in the future the Comptroller will not permit award to a bid offering delivery earlier than the minimum required delivery date. This uncertainty arises from the realization that in the past the Comptroller has appeared to focus on actual prejudice in finding bids failing to meet required delivery dates unacceptable.

Incomplete and Indefinite Bids

Missing and Improper Signatures

Problems of responsiveness in the area of signature requirements have arisen both as the result of a bidder's failure to personally sign his bid and as the result of the manner in which a

"signature" has been affixed. In measuring the materiality of deviations in this area the Comptroller General has examined the bid documents to determine if it appeared that the bidder would be obligated to perform upon Government acceptance in spite of the deviation. Where it has appeared that such an obligation was not present bids have been found nonresponsive based upon the fact that the bidder would be able to elect, after bids had been opened and prices revealed, to acknowledge or deny the bid.

In an early decision the Comptroller held that the failure to sign a bid was an informality which could be waived if the bid had been in the custody of the Government since the date of bid opening and was signed by the bidder prior to award. In the case the bidder had signed a bid bond which was submitted with the unsigned bid. While the opinion appeared not to hinge upon this fact, a subsequent decision interpreted it narrowly, construing it to mean that an unsigned bid might be considered only where accompanied by other material signed by the bidder clearly indicating the bidder's intention to be bound by the unsigned bid. Thus, it has developed that the primary method of determining the acceptability of an unsigned bid is whether the deficiency may be cured by "incorporation by reference" to a signature or initials elsewhere on the bid or upon document submitted with the bid.

The major procurement regulations reflect this "incorporation by reference" concept by providing that an unsigned bid may be considered for award if it is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid.

Applying this principle, the Comptroller has found a sufficient basis to determine that a bidder was obligated in spite of a failure to sign a bid, where an official authorized to sign the bid initialed a change in the bid price, where a signed bid bond had been submitted with the bid, where a bidder personally delivered the bid and signed the bid envelope in the presence of a Government representative, and where the bid was submitted with a signed amendment to the invitation. On the other hand, the mere submission of samples with an unsigned bid has been held to constitute an insufficient basis upon which to find such an obligation since it is felt that intent to be bound must be indicated by a signature or its equivalent.

The fact that the Comptroller has applied the principle of ratification in order to avoid prejudice to other actual bidders has been illustrated in decisions in which unsigned bids have been found acceptable. In one decision a bidder was permitted to sign its bid after bid opening and to receive an award where his bid was the only one received and opened. In so ruling the Comptroller stated:

> It is apparent, however, that both the regulation and the decisions cited above are directed to preventing a bidder from electing, after bids have been opened and prices have been revealed, whether he will acknowledge or deny the bid, since such an option would give the bidder an unfair advantage over other bidders whose bid prices were revealed at bid opening . . . .
>
> Conversely, where only one bid is received, and that bid is found upon bid opening to be unsigned, we see no reason why the bid should be rejected. Clearly, since in that situation there are no other bidders, it would not be unfair to ask the bidder whether he intends to be bound by his bid, or to

permit him to sign the bid after bid opening.

In another decision, applying the same rationale, the Comptroller found an unsigned bid acceptable where it was the first bid opened and the bidder agreed to endorse it prior to the opening of the other bids.

Closely related to the situation of unsigned bids is that of bids presented with "signatures" in other than script form. In determining whether such bids are acceptable the Comptroller, as he has done with unsigned bids, has focused upon the principle of obligation in an effort to insure the avoidance of actual prejudice. Thus, while it has been held that a handprinted name may be treated as a valid signature since the bidder would be bound to it to the same extent as that of a script signature, "signatures" affixed by mechanical means have been found insufficient absent evidence submitted prior to bid opening that the bidder had adopted and recognized such facsimile as his own signature. Consequently, bids with typewritten or rubber stamped "signatures" have been found unacceptable.

Difficulties with bid signatures have also arisen in situations where the bid has not been signed by the bidder but by an agent of the principle. The standard bid forms provide that in such a case evidence of the agent's authority must accompany the bid if not furnished previously. The Comptroller's position regarding whether the failure to furnish such evidence [illegible] is nonresponsiveness has undergone a [illegible]

Initially, it was held that the [illegible]

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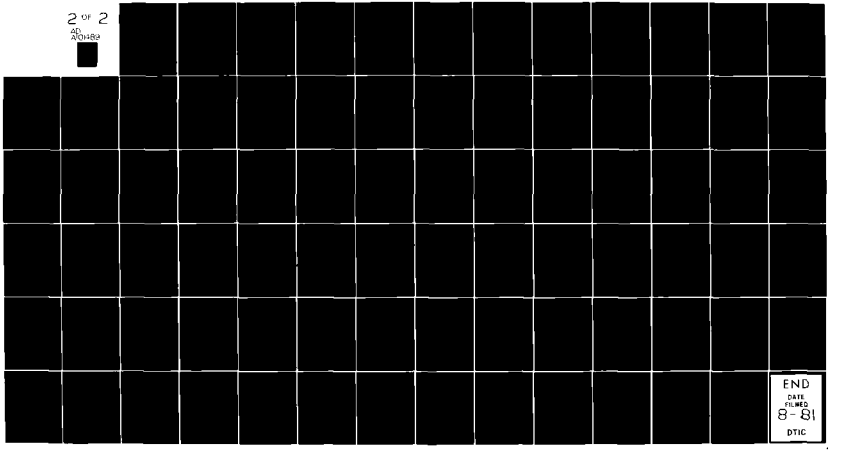

such authority prior to bid opening would result in nonresponsiveness unless through prior dealings between the parties the Government was entitled to rely upon the agent's apparent authority.[100] This approach was taken as a result of the belief that absent such evidence the bidder could disqualify himself after bid opening by disavowing the agent's authority. The situation reversed itself in an interesting decision in 1970 in which the Comptroller stated that his prior rule had been overly restrictive and that in the future such evidence could be furnished after bid opening.[101] The basis for the change was the belief, not that the bidder would be obligated, but that the agent would be. Under these circumstances it was felt that the Government could rely upon the fact that any false disavowels of an agent's authority would be challenged by the agent. More recent decisions do not indicate a trend away from this approach.[102]

Bids Containing Ambiguity

Occasionally a bid will be submitted which is prepared in such a fashion that it is unclear what was intended by the bidder. Where it has appeared that the bid was capable of two reasonable interpretations under one of which it would be nonresponsive[103] or where its price was capable of two reasonable interpretations under one of which it would not be the lowest bid,[104] the Comptroller has held that the bid must be rejected. Where, however, it has been felt that there was but one reasonable interpretation, and under that interpretation the bid would be responsive, the bid has been found acceptable.[105] Similarly, where there was

but one reasonable interpretation as to the bid's price, and under that interpretation the bid would be the lowest, then the bid has been found responsive.[116] In determining whether a bid is capable of more than one reasonable interpretation, and hence ambiguous, the Comptroller has examined both the bid documents and the facts surrounding the solicitation and receipt of bids.[117]

The Comptroller has found ambiguous bids nonresponsive out of concern that the acceptance of such bids would provide bidders with "two bites at the apple". It is felt that where a bid is ambiguous an opportunity to"second guess" would arise from the fact that after bid opening it would be necessary for the Government to obtain clarification from the bidder.[118]

Situations in which ambiquity has resulted in issues of responsiveness have varied. Among the most common have been those in which bids contained language of a precatory nature which could be interpreted as conditioning the bid, those in which the bid contained information which made it uncertain whether the bidder was offering a conforming product or service, and those in which the price of the bid was uncertain. In each of these areas the issue of bid acceptability has been resolved based upon whether it appeared that an obligation to perform could be found without having to seek clarification from the bidder.

Construing the Ambiguity Against the Bidder

In an early decision, the Comptroller General held that where a bidder's offer was ambiguous the resultant contract need not be disturbed since the bidder had created the ambiguity. Under

these circumstances it was indicated that an award could be made based upon the interpretation most favorable to the Government.[10] Utilizing this decision as authority, in a handful of decisions in the early 1960s, rather than find ambiguous bids nonresponsive, the Comptroller ruled that they were acceptable when based upon the interpretation most favorable to the Government.

Two decisions reflect this approach. The first involved an invitation for the furnishing of surety bonds. The invitation solicited bids upon three types of coverage. The bidder submitted a single price but failed to indicate the type of coverage to which it applied. Rather than find the bid nonresponsive, the Comptroller, construing the ambiguity against the bidder, held that the bid could be accepted for the type of coverage which would be the least advantageous to the bidder and the most advantageous to the Government.[11] In the second decision, the Comptroller interpreted a bid as offering a bid price that included all of the individual items in the bid schedule even though the bid as submitted was ambiguous regarding whether these items were to be furnished for the total price quoted.[12]

These decisions are difficult to reconcile with decisions that were rendered during the same time frame in which the Comptroller held that an ambiguous bid was nonresponsive.[13] The Comptroller, apparently recognizing this fact, attempted to clarify his position in a 1961 decision in which it was stated that it would be impermissible to accept an ambiguous bid based upon an interpretation most favorable to the Government unless that inter-

pretation was a reasonable one.[113] Since the 1960's the Comptroller's position has been one of rejecting ambiguous bids rather than accepting them based upon a construction most favorable to the Government. The handful of decisions in which bids were accepted upon that basis are now cited as authority to construe the ambiguity against the bidder only in situations where other bidders would not be prejudiced.[114]

Ambiguity Created by "Requests"

As indicated earlier in this paper, bids have generally been found nonresponsive when they imposed conditons not already present in the invitation.[115] Where bids have been submitted that were unclear as to whether they were imposing such a condition or simply making a suggestion the Comptroller has found them nonresponsive due to ambiguity. Such ambiguity has been created when bidders submitted their bids with "requests" that the Government provide progress payments[116] or that certain contract clauses be deleted.[117] The Comptroller has found such bids nonresponsive whether the "requests" were in the bid itself[118] or in a transmittal letter accompanying the bid.[119] Even though in its ordinary usage a request is precatory in nature, the Comptroller has taken the position that when such a request accompanies a bid it is not unreasonable to view the request as something more than a mere desire.[120] Consequently, such "requests" are felt to result in two reasonable interpretations. The first being that the bidder would not perform absent receiving his request and the second that he would.[121]

Consistent with the application of the principle of obligation, however, the Comptroller has indicated that when such a "request" is accompanied by a clear statement that the bidder is offering to perform without the condition requested then the bid is acceptable.[124]

Ambiguity Relating to the Item Offered

Ambiguity has also arisen in situations in which it was uncertain whether the bidder was offering to furnish items conforming to specification requirements listed in the invitation.[125] Normally such ambiguity has occurred as a result of bidders including in their bids nonconforming unsolicited descriptive literature and drawings[126] or a model or part number.

The Comptroller has stated that unsolicited nonconforming descriptive literature cannot be ignored and when submitted with a bid the bid will be considered nonresponsive if either it appears reasonable that the bidder intended to qualify his bid or if ambiguity exists as to what the bidder intended to offer.[128]

In deciding whether such ambiguity has existed the Comptroller has examined the literature and the bid to determine if it reasonably appeared that the bidder was offering to provide the nonconforming product described in the literature. Where it was felt that the circumstances indicated the bidder was providing the literature solely for informational purposes the bid has been found acceptable.[129] On the other hand, where a bidder has specifically identified the nonconforming product described in the literature in a letter to the agency accompanying his bid[127] or

where a bidder has submitted literature indicating that the product being offered would not meet the invitation's requirements, the Comptroller has found the bid nonresponsive.[128]

A different approach has been taken where the ambiguity has arisen as the result of the inclusion of an unsolicited part or drawing number in a bid. While such a situation has been held to create initial ambiguity,[129] the Comptroller, applying the principle of obligation, has stated that such bids are acceptable where the bid includes an express statement that the model conforms with all requirements listed in the invitation.[130] Another method recommended by the Comptroller to resolve such an ambiguity has been that the contracting officer examine data that was available prior to bid opening to determine if the part identified by the model number conforms to the specifications in the invitation.[131] The Comptroller appears to favor this approach. In one decision, for example, a bidder crossed out a part number listed in the invitation and inserted his own part number while indicating that the same part had been used in a contract with another agency. The Comptroller advised the procuring agency that it was improper to reject the bid without first attempting to determine whether the part previously supplied would meet the agency's requirements.[132]

Price Ambiguity

One of the most frequent causes of ambiguity has resulted from an unclear statement of bid price.[133] Decisions in this area illustrate both a concern for the avoidance of actual prejudice

and the extent to which mental gymnastics has been utilized in attempting to explain why an ambiguity has failed to exist in certain instances.

In decisions involving price ambiguity the Comptroller has found bids nonresponsive where more than one reasonable interpretation existed as to what price a bidder intended to bid and under only one of these interpretations would the bid be low.[134] Under these circumstances to accept such a bid would permit the bidder to control his eligibility after bid opening based upon which price he chose to support.

Some bids have been found ambiguous where the sum of the unit prices exceeded that of the total amount entered in the bid.[135] Ambiguity was said to exist because of uncertainty relating to whether the total amount entered was intended as a discount for a total award or represented an unintended mistake in bid.[136]

Another frequent cause of price ambiguity has resulted where bidders, rather than enter a price for all items listed on an invitations bid schedule, have inserted symbols in the blanks provided. Where the Comptroller has felt that the only reasonable interpretation of the entry was that the bidder intended to furnish the item at no charge, the bid has been found acceptable. Following this approach bids have been found acceptable where, rather than enter a price, the bidder has entered: "Incl";[137] "0";[138] "n/a";[139] "included";[140] or inserted dashes.[141] In each case the Comptroller looked to the circumstances surrounding the

entry to determine whether the symbol created ambiguity. In some of the decisions involving the use of symbols the Comptroller appears to be reaching quite a distance to find an obligation to perform without charge. For example, in one decision where a bidder entered a dash rather than a price the Comptroller took the position that this indicated that the bidder was aware that something was to be inserted in the space and, therefore, the insertion of the dash obligated the bidder to furnish the item without charge.[103] It would appear just as logical to assume that the bidder failed to note the requirement to bid on the item and entered a dash because it did not desire to do so.

The Comptroller has held that bids containing ambiguities in price are acceptable, regardless of which interpretation was followed, the bid would remain low.[104] In such cases any possibility of actual prejudice has been removed. However, it has been indicated that only if the bidder agrees to the interpretation most favorable to the Government would it be permissible to make an award in such a situation.[105]

Failure to Bid Upon Required Items

Occasionally a bid will be submitted in which the bidder has failed to enter a bid upon all required items listed in the invitation. Such deviations have arisen in situations where the bidder has failed to enter a price for all items listed in the invitation's bidding schedule or as a result of a bidder's failure to bid upon a required option or alternate. In determining the materiality of these types of deviations the Comptroller has

the basis of the alternate.

While such a position may be consistent with application of the principle of actual prejudice, it is clearly inconsistent with that of potential prejudice since a requirement to bid upon an alternate may be a sufficient reason to deter propsective bidders from competing.[101] Moreover, the position of the Comptroller is at odds with the goal of preventing favoritism in advertised procurement through restricting the discretion of contracting officials. It leaves the determination of whether the bid is or is not acceptable in the hands of agency officials since they determine whether to award on the alternate or not.

A bidder's failure to bid on a required option may result in a bid's rejection for nonresponsiveness. However, the Comptroller has indicated that such a failure will result in a finding of nonresponsiveness only when one of two circumstances are present. First, where the Government intends to exercise the option at the time of the award, therefore, making the option bid significant for purposes of bid evaluation.[102] Second, where the invitation specifies that the option prices not exceed the basic bid prices or establishes some other standard for option pricing.[103] This latter circumstance, it is felt, makes option bidding significant since by failing to bid an option a bidder would be depriving the Government of the benefit it attempted to achieve by establishing standards for option bidding.[104]

Even where one of these two conditions has been present a failure to bid a total option has not always been fatal to a bid's

acceptability. The Comptroller has found such bids acceptable where it was possible to obtain a price for the omitted portions of the option by application of the pricing pattern rule.[11] In applying the pricing pattern rule to bids omitting prices for options the Comptroller has required that not only must the price be the same for all identical items bid upon, but also that the bidder have bid on some of these items in the option. Where the bidder has failed to bid upon any portion of an option at all the Comptroller has found the bid nonresponsive in spite of the fact that there was a consistent pricing pattern throughout the other portions of the bid.[12] The rationale has been that by omitting the entire option the bidder has created uncertainty as to whether he intended to bid the option. While it is not clear from the opinions, it is apparent that the Comptroller believes that under these circumstances the bidder would not be obligated to perform the option requirements at the price offered elsewhere in the bid.

Failure to Return Invitation Provisions

An interesting situation arises where a bidder in submitting his bid fails to return all portions of the invitation. Where the omitted portions contained material provisions this seemingly innocuous action has resulted in determinations of nonresponsiveness even though there has been no requirement in the standard invitation for bid forms that bidders return with their bids all portions of the invitation.[13]

The Comptroller's rationale is based on the fact that when a bidder fails to return all material documents with his bid which

were attached to the invitation, acceptance of the bid would not create a valid and binding contract requiring the bidder to perform in accordance with all of the material terms and conditions of the invitation.[170] As a result, the materiality attached to a bidder's failure to return all portions of the invitation depends upon whether or not he would be obligated to perform all essential requirements in spite of the omission. In ascertaining whether such an obligation exists the primary focus has been to determine whether based upon the bid as submitted there has been an "incorporation by reference" of those materials that the bidder has failed to submit. When this can be found the Comptroller has held that the bid is nonresponsive. Applying this concept the Comptroller has found a bid acceptable in a case where in the materials actually submitted the bidder identified the solicitation fully, stating the exact number of pages that comprised it, and in a case where a bidder submitted two pages of the invitations bid schedule which made reference to the material provisions of the invitation which had not been returned.[171] On the other hand, where a bid was returned without certain material provisions, and with no documents that referred to the missing provisions, it was held that there was an insufficient basis to find incorporation by reference.[172]

As with any area where the Comptroller applies the principle of obligation to measure the acceptability of nonconforming bids, resolution appears to be largely determined upon the basis of the particular facts in each case. It is clear, however, that

bidders cannot guard against the inadvertent failure to return all documents by a statement in a cover letter indicating that all applicable documents are being submitted. The Comptroller has held that such a statement merely creates ambiguity as to whether the bidder means all documents required or all documents being returned.[70]

Failure to Provide Required Items
Descriptive Literature and Bid Samples

It is not uncommon in federal procurement for an invitation to require that bidders furnish with their bids descriptive literature or data on the items being purchased. Similarly, on occasion an invitation will require that bidders furnish prior to bid opening samples of the product being offered. As a general rule, when a request for descriptive literature is properly made the literature must be submitted in accordance with the terms of the invitation, be sufficient for purposes of bid evaluation, and comply with the invitation's specification requirements.[71] Similarly, samples properly requested must be furnished[72] and comply with the characteristics listed to be examined.[73] Whether the Comptroller will find a bid acceptable in spite of a failure to meet such a requirement depends upon the purpose behind the request, the adequacy of the materials presented and whether the literature or samples actually submitted indicate that the product being offered conforms substantially with that which is requested in the invitation.[74]

While the foregoing accurately summarizes the Comptroller's

present approach it is not reflective of the policy followed by the Comptroller in his initial decisions. Early Comptroller decisions consistently held that a failure to furnish descriptive literature or samples was not fatal to a bid's acceptability. Rather, the Comptroller indicated that the interests of the Government would not be served by the rejection of a bid simply because it failed to furnish literature or samples since the failure had no affect on the price, quality or quantity of the items to be furnished.[17] In these early decisions agencies were notified that where a low bidder had failed to submit descriptive literature or samples with his bid, the agency should attempt to acquire these materials after bid opening and only if the bidder then failed to produce the items should the bid be rejected.

This position underwent a marked change during the 1950s as the Comptroller formulated the rule against "two bites at the apple". In a series of decisions during that decade the Comptroller established that where literature or samples were essential to an agency's determination of whether the offered item met the needs of the Government, thus being necessary to enable procuring officials to conclude precisely what the bidder proposed to furnish, then the failure to submit such materials prior to bid opening would be a cause for rejection.[18] In a later decision the Comptroller indicated that this change was occasioned by concern that by not providing these items before bid opening it would be possible for a bidder to control his eligibility for an award after

opening.[179] It was felt that if a bidder desired to qualify he could submit the materials in the proper form and if he did not desire to qualify he could submit materials diverging so widely from the specifications as to create doubt as to his ability to meet the agency's requirements.

Once it is recognized that the underlying principle behind a requirement of bid responsiveness in this area is actual prejudice and the rule against "two bites at the apple", rather than potential prejudice or the rule of price, quality, quantity or delivery, the task of determining what kinds of deviations will be permitted by the Comptroller is made simpler. The key to acceptability is whether the required materials are necessary to evaluate the characteristics of the bidder's product to insure conformity with the Government's requirements and if so if the information the Government possesses prior to bid opening is sufficient for purposes of evaluation in the absence of such materials.

Literature and Data

With regard to descriptive literature, a question of a bid responsiveness will not even arise unless the agency in requesting such literature complys with certain procedural requirements. In requesting descriptive literature it is required that the invitation specify what literature is required, the purpose to be served by it's submission, the extent to which it will be considered in evaluating bids, and the result should there be a failure to furnish the literature.[180] Where the requirement for the literature

focused upon whether the acceptance of such a bid might result in actual prejudice by providing the bidder an opportunity at "two bites at the apple". Accordingly, these bids have been found acceptable where it was determined that the bidder would be obligated to perform in accordance with the Government's requirements in spite of the omission.

Failure to Price Items on the Bidding Schedule

Generally a bidder's failure to bid upon or enter a price for all items listed in the invitation's bidding schedule does not constitute a basis upon which to find his bid unacceptable.[145] In such cases it is permissible to consider the bid for award on those items which were actually bid upon. However, where the bidder has indicated that he would only accept an award for all items listed[146] or where the invitation required a bid upon all items,[147] the failure to quote a price on all items has been considered a material deviation requiring the bid's rejection. The Comptroller has stated the purpose for this rule as the following:

> A bid is generally regarded as nonresponsive on its face for failure to include a price on every item as required by the IFB . . . . The rationale for these decisions is that where a bidder failed to submit a price for an item, he generally cannot be said to be obligated to perform that service as part of the other services for which prices were submitted.
>
> To promulgate a rule which would allow bidders to correct a price omission after an allegation of mistake in bid would generally grant the bidder an option to explain after opening whether his intent was to perform or not perform the work for which the prices were originally omitted. To extend this option would in effect be tantamount to granting the opportunity to submit a new bid.[148]

Therefore, in determining acceptability the issue to be

resolved has been whether the bid as submitted bound the bidder to perform all of the work required notwithstanding the omission of one or more unit prices. When it was felt that such an obligation did not exist bids have been found nonresponsive, even though evaluation was to be made upon the basis of the total amount of the bid.

Where bids have been submitted without a price for a required item, but with a total price, this "obligation" has been determined based upon whether it appeared from the bid that the total price was meant to include the omitted item. In those situations where it was felt that it was the bidder's intent to include those items bids have been found acceptable. Examples of situations in which such an intent has been found include the the following: where a bid's total price exceeded the sum of the items bid upon and next to the total the bidder had inserted that the sum entered included a bid for all items; where a bid was accompanied by a delivery schedule which indicated the bidder's intent to furnish the item; and where by the space provided for the total price it was printed on the bid form that the sum entered included a bid on all items. On the other hand, in a case in which the sum of the bid total matched the sum of the items for which prices were entered and there was no indication that the bidder intended to bid upon the omitted item, the bid was found unacceptable.

One of the most significant exceptions to the general rule that a failure to enter a bid price for a required item must result in rejection is known as the pricing pattern rule. It also is

based upon the principle of obligation and provides that even though a bidder has failed to submit a price for an item in a bid, that omission can be corrected if the bid, as submitted, indicates not only the probability of error but also the exact nature of the error. The Comptroller's rationale for this exception has been that under such circumstances to find the bid nonresponsive would be to convert an obvious clerical error of omission into a matter of nonresponsiveness.[155]

Decisions applying the pricing pattern rule have involved bidding schedules soliciting bids upon similar items. The position taken by the Comptroller has been that even though a bidder did not bid a price for an item, an intent to bid a certain price was apparent as a result of the bidder's bidding the same amount for the same item throughout the other parts of the bidding schedule. Under these circumstances, absent clear and convincing evidence that the bidder intended a price different from the one established by the pricing pattern, the bid has been found acceptable based upon the belief that the bidder did not have an option to refuse an award on those items at the price that was evidenced elsewhere in the bid.[156] One such case involved the procurement of a quantity of oscilloscopes. On the schedule the bidder bid a consistent price for all quantities for which a bid was entered but failed to enter a price for nine of the oscilloscopes. This omission was considered immaterial in light of the consistent pattern through the other portions of the schedule.[157]

The Comptroller has broadened the applicability of the

pricing pattern rule to cover not only situations where the pricing pattern on an item is identical, but also to situations where the pricing pattern is generally consistent and the difference in price considered de minimus. While it appears questionable whether under ordinary circumstances a bidder would be obligated to furnish items he failed to bid on at the same price as that he bid on identical items elsewhere in the bid, it is even more doubtful that a bidder would be obligated when he did not even bid the same price. What the Comptroller actually appears to be doing with the pricing pattern rule is not applying the principle of obligation to find bids responsive, but rather permitting the correction after bid opening of what are nonresponsive bids under any principle of responsiveness.

Failure to Bid Alternates and Options

The Comptroller has taken the position that a bidder's failure to bid upon an alternate listed in an invitation is not a material deviation even if the invitation specifically requires bids upon such an alternate. The rationale has been that by failing to bid upon an alternate the bidder obtains no advantage over his competitors as ". . . such a failure can only operate to the advantage of other bidders rather than to their disadvantage since a bidder not submitting an alternate eliminates himself from competition with other bidders so far as the alternate work is concerned". The failure to bid on alternate will result in rejection only if it is determined by the Government to make award on

lacks sufficient clarity to place bidders on notice of what was desired, cancellation of the invitation has been directed,[182] in spite of the fact that the agency may have had sufficient justification for the requirement.[183]

Even where a requirement is clearly stated a failure to conform does not automatically require rejection. There must first have been justification for the requirement. Both major procurement regulations provide that descriptive literature may only be required when it is necessary to determine whether the product offered meet specification requirements and to establish exactly what the bidder proposes to furnish.[184] The Comptroller has stated that a requirement for descriptive literature is not justified if the specifications are so detailed that they leave nothing for the bidder to describe.[185] When not justified a failure to provide literature is regarded as an immaterial deviation. The rationale is that the bidder would be obligated to comply with the specifications regardless of whether or not such literature was furnished.[186] Consequently, unless an obligation to meet the Government's requirements cannot be found without the required literature a failure to comply is considered an insufficient basis for rejection.[187]

The Comptroller has also found bids failing to provide descriptive literature acceptable where it appeared that the literature was to be used, not to measure the conformity of the product being offered, but to evaluate a bidder's capacity to perform.[188] In such cases it has been held that the literature was for pur-

poses of determining bidder responsibility rather than bid responsiveness.[138] Under such circumstances the literature may be furnished at any time prior to completion of bid evaluation, even where the invitation warns that failure to furnish the literature may be cause for rejection.[139] This position would appear consistent with the principle of obligation as the failure to furnish such information would have no affect upon the bidder's commitment to perform. However, permitting the acceptance of bids failing to furnish such required information is inconsistent with the principle of potential prejudice. A requirement to furnish such literature may deter prospective bidders from competing irrespective of the basis for that requirement.

Since the purpose behind a proper request for descriptive literature is to enable the procuring agency to evaluate bids, nonresponsiveness has resulted not only from a failure to submit literature,[140] but also from the submission of literature that is insufficient for purposes of bid evaluation.[141] The Comptroller has held, however, that a failure to furnish adequate literature does not justify rejection in all cases. Where the information necessary for evaluation is obtainable by the application of recognized formulae (of mathematics, physics, or chemistry) to information already provided, the bid is acceptable.[142] The basis for this exception has been expressed as follows:

> While . . . a descriptive data requirement must normally be regarded as material and complied with fully, we think that, having in mind the purpose

> of such requirement, a distinction must be drawn between data which represent a relatively free choice by the bidder, and data which are found by the application of information furnished in the invitation or the bid to the limitations of a recognized mathematical formula rule or physics or chemistry. Strict application of the general principle in the latter case would appear to serve little purpose other than to determine the ability of the bid preparer to apply the formula or rule to the given information. . . . Rejection of a bid in that instance, not withstanding the language of the descriptive literature requirement, would be unjustifiable.[14]

Consequently, the Comptroller's approach has been that complete literature is not necessary for evaluation in such a circumstance and as a result the bidder would not obtain a competitive advantage by being able to disqualify his bid after bid opening by furnishing nonconforming literature.

The Comptroller has taken a related position in "brand name or equal" procurements. In such situations it is required that bidders bidding on an "or equal" basis furnish descriptive literature to permit the procuring agency to determine if the offered product will equal the brand name product.[15] However, the failure to submit such literature does not necessarily result in a finding of nonresponsiveness. The Comptroller has held that a failure to comply which does not affect the ability of the contracting agency to evaluate the bid and determine what the bidder would be bound to supply upon acceptance will not require rejection.[16] Consequently, in one decision where a bidder identified the product he intended to provide as identical to that furnished under a prior contract, but failed to submit descriptive literature describing the product, his bid was found acceptable where

the agency could determine by reference to the prior contract that the product was equal to the brand name product. It is interesting to note that the Comptroller has stated that bidders may even furnish such literature after bid opening as long as the product was identified in their bid and the literature publicly available prior to bid opening.[11] In such cases it is felt that the bidder is obligated to provide the product identified in his bid and merely becomes an instrument for furnishing the pre-existing data to the procuring agency.

Samples

For the most part the rules of responsiveness applicable to bid samples are consistent with those applicable to descriptive literature. The procurement regulations provide that bidders should not be required to furnish a bid sample unless there are certain characteristics of the product which cannot be described adequately in the specification.[12] As with descriptive literature, the invitation must specifically advise bidders of the requirement and of the results which will follow a failure to furnish samples or the furnishing of unacceptable samples.[13] In addition, the invitation must list the specific characteristics the samples would have to meet. The Comptroller has indicated that if subjective characteristics are listed they must be defined with sufficient clarity so that all bidders will be aware of what is required[14] and has stated that he would find legally questionable an agency's decision to reject a bid failing to conform to a vaguely stated requirement.[15]

Where the specification has been clear, definite, fully set forth the Government's requirements and there was no characteristics which could not be described adequately in the specification, a requirement for a bid sample has been held unnecessary to evaluate compliance.[232] The Comptroller has stated that in such a situation the failure to submit a bid sample will not result in a finding of nonresponsiveness. By submitting a bid in response to the invitation the bidder would be obligated to its terms regardless of whether or not he submitted the sample. Under these circumstances it is felt that the bidder would obtain no competitive advantage by not submitting the sample prior to bid opening.[233]

As in the case with descriptive literature requirements, where a requirement for a bid sample has related to a bidder's ability to produce an item rather than to whether the product conformed with the invitation, the failure to submit such sample prior to bid opening has not resulted in a finding of nonresponsiveness.[234]

One of the more interesting positions taken by the Comptroller with regard to bid samples relates to situations where the sample conforms to the characteristics required for evaluation but fails to conform to other specification requirements. While the general rule is that a failure to conform with the characteristics required for evaluation results in nonresponsiveness,[235] the Comptroller has taken a different position regarding a failure to conform with the unlisted characteristics. In a decision

addressing this issue the Comptroller found a bid responsive where the sample conformed to the color, pattern and finish characteristics required for evaluation even though it failed to conform to the material requirements otherwise listed in the invitation.[205] The basis for decision was that the bidder, by submitting the deviating sample, was not relieved from complying with the specifications. This was because the invitation provided that products delivered under any resulting contract would comply with the approved sample as to the characteristics listed for examination and with the specifications as to all other characteristics. Therefore, applying the principle of obligation, the Comptroller found the bid acceptable.

Shipping Information and Guaranteed Weights

One of the more clear situations in which the Comptroller has applied the principles of actual prejudice and obligation in tandem has related to requirements for shipping information and guaranteed shipping weights. Such a requirement is normally included when bids have been solicited f.o.b. origin. The purpose behind the requirement is to enable the Government to utilize such information to determine the costs it would incur in transporting items being procured from point of origin to destination. This information is significant because where delivery is f.o.b. origin agencies may consider the transportation costs beyond delivery point in evaluating bids.[206] To aid in this evaluation agencies have required information concerning the location of the point from which the items would be shipped,[207] the site of the

nearest rail terminal or port to which the items would be delivered, and a guaranteed maximum shipping weight of the items.[72]

Point of Origin

Normally a bidder's failure to comply with a requirement to designate the point of f.o.b. origin in its bid has resulted in a determination of nonresponsiveness.[73] The basis for decision exists in the significance of a fixed point for purposes of bid evaluation and the fact that by not furnishing a fixed point it becomes possible for the bidder to legally vary the point of origin after bid opening thereby affecting his bid's competitive character by increasing or decreasing its overall cost to the Government.[74] For a similar reason it has been held that a bidder's failure to designate a port to which the procured items will be delivered for ocean shipment renders a bid nonresponsive.[75]

The failure to furnish a point of origin, however, does not constitute a cause for rejection, when information provided elsewhere in the bid is sufficient to establish a point of origin.[76] In applying this exception, the Comptroller has focused upon whether information furnished elsewhere in the bid manifests a firm and definite offer to tender delivery at a specific location which cannot be altered after bid opening. Where such has been the case the bid has been acceptable in spite of its failure to clearly identify a point of origin. Applying this exception, the Comptroller in one decision found a bid responsive where a shipping point was not designated in the space provided but elsewhere in the

bid the bidder had listed a location for pick up and delivery. Under these circumstances it was felt that the bid evidenced an obligation to utilize that location as the point of origin. On the other hand, in another case the Comptroller found a bid nonresponsive where it failed to provide a point of origin in the space provided. This occurred even though elsewhere in the bid the bidder indicated its principle place of manufacture for purposes of the inspection and acceptance clause of the invitation. The Comptroller concentrated upon the fact that there was no necessary correlation between the designated place of principle manufacture named in the inspection and acceptance clause and the designated f.o.b. origin point. Under these circumstances it was believed that the bidder would have had an opportunity to designate a point of origin after bid opening, particularly since the inspection and acceptance information was by its nature considered subject to change after opening.

Considering that the object of requiring a designated point of origin is to permit evaluation of the costs of transportation, the Comptroller has taken the approach that where such an evaluation would not be possible in either event the failure to furnish a point of origin constitutes an immaterial deviation. As a result, where the final destination has not been known at the time of bid evaluation the failure to designate a point of origin has not resulted in a finding of nonresponsiveness. This approach appears consistent with the principle of actual prejudice. Since the destination is unknown at the time of evaluation, a failure to identify

a point of origin would not provide a bidder with a post-bid opening opportunity to modify the overall cost of its bid to the Government by designating a delivery point from which transportation costs would be less expensive. However, because award would be made without regard to the requirements listed in the invitation such an approach would violate the principle of potential prejudice.

The Comptroller has also found the failure to furnish information relating to point of origin immaterial where it has concerned the facilities available at the point of origin rather than a designation of a point of origin. The basis for the distinction is that information relating to the nature of the facilities available at the point of origin is fixed and not subject to the control of the bidder. Consequently, believing that this deprives a bidder of an option to qualify or disqualify for an award after bid opening, the Comptroller has taken the position that such information may be furnished by the bidder after bid opening.

Guaranteed Shipping Weight

A similar rationale underlies the Comptroller's determination of responsiveness where a bidder has failed to provide a guaranteed shipping weight. A requirement for a guaranteed shipping weight is mandatory in all invitations where optional packaging methods are permitted and shipping weights are a factor in evaluation. The use of a guaranteed shipping weight is necessary to insure proper evaluation by obligating the bidder to the Government for any costs attributable to a higher weight than that specified.

As a general rule, a bid failing to include a required guaranteed shipping weight will be found nonresponsive. However, the Comptroller has permitted the acceptance of bids failing to provide a guaranteed shipping weight in situations where the maximum possible weight could be determined. When this has been the case evaluation was permitted based upon that weight. The basis for this exception has been expressed by the Comptroller in the following terms:

> [T]here is no question as to the bidder's undertaking to meet all requirements of the specifications, including delivery, or as to the price to be paid to it therefor. The only question is as to the determination of whether the bid "conforms to the invitation and will be most advantageous to the United States, price and other factors considered", ... Since the shipping weight and dimensions are material only to the determination of the Government's ultimate costs, and their omission therefore actually affects only the determination of whether [illegible] will be the most advantageous . . . we do [illegible] believe that the omission should be regarded as [illegible] the bid nonconforming . . . unless it clearly [illegible] the making of that determination with [illegible]

[illegible] it is obvious that primary concern is with [illegible] weight [illegible] be fixed prior to bid opening. If so, the [illegible] considered acceptable in spite of the fact that the [illegible] not be obligated to a specific weight or required to [illegible] the Government for any weight excess. Apparently it is believed that [illegible] is taken by the Government since the maximum possible weight could never be surpassed.

Aside from the foregoing, the Comptroller has also permitted the acceptance of bids failing to provide guaranteed shipping

weights in two other situations. Many invitations automatically establish a guaranteed weight to be utilized in the event that the bidder fails to insert his own. This weight can be based on the highest transportation cost producing shipping data submitted by any other bidder [226] or on estimated weights and dimensions otherwise stated in the invitation.[227] Where these weights are automatically provided, the Comptroller, applying a principle of obligation, has found bids acceptable even though they failed to provide a guaranteed weight.[228] The Comptroller has also found bids failing to furnish guaranteed shipping weights acceptable where the furnishing of such weight would not assist in fixing the government's total cost or in the evaluation of bids. Thus, where the destination point has been uncertain a failure to provide such weights has not disqualified bids from consideration.[229] This latter exception is consistent with the Comptroller's expressed view that such information is necessary solely for purposes of bid evaluation and that the failure to furnish such information will require rejection only when it is inadequate for purposes of that evaluation.

Subcontractor Data

One of the more disturbing areas in which the Comptroller has had to determine the acceptability of nonconforming bids involves the failure to submit complete subcontractor data as required by an invitation. Such information generally relates to the identification of what portion of the total work will be performed by specified subcontractors. What is disturbing about this

area has been the Comptroller's fluctuating approach and apparent willingness to permit agencies to influence his position as to whether such a deviation is material.

During the past twenty years the Comptroller has nearly completed a 360 degree cycle in his attitude towards the materiality of a failure to furnish this type of information. Early decisions held that the failure to submit subcontractor information was not a basis for nonresponsiveness. It was felt that such a requirement went to the issue of a bidder's ability to perform rather than to the responsiveness of his bid. As a result, bidder's were permitted to provide such information after bid opening. This position was taken in spite of arguments from protestors that by failing to furnish such information prior to bid opening a bidder would have a competive advantage. They argued that the bidder could obtain "two bites at the apple" by being in a position to refuse to furnish this information after award so that he, not being bound to any particular subcontractor the bidder could bid a lower price as a result of his knowledge that he could obtain increased competition from potential subcontractors after receiving an award.

In 1963, however, this approach was modified as a result of concern expressed by the General Services Administration (GSA) over the practice known as "bid shopping". The term "bid shopping" is utilized to describe situations in which a low bidder who has not been required to specifically list his proposed subcontractors can search after bid opening for more favorable sub-

contractors and obtain lower prices. GSA's concern arose from a belief that such practices resulted in substandard work, inflated bids and the deterrence of many subcontractors from bidding on a subcontract out of knowledge that there would be no assurance they would receive it after award. In altering his position the Comptroller indicated that since a requirement to list subcontractors might tend to discourage such practices he would in the future consider the failure to comply a material deviation.

Once the policy was changed the Comptroller began to apply the rules of responsiveness to this area. The failure to list subcontractors for all required categories of work and the listing of alternate subcontractors have both led to findings of nonresponsiveness. In each case the materiality of the deviation has resulted not from the fact that the deviation affected a bidder's obligation to perform in accordance with contract specifications but rather from the fact that by their failure to conform the bidders would be in a position to "shop around" after bid opening for more favorably priced subcontracts.

The Comptroller has taken the position that in the absence of a statutory or regulatory requirement for the listing of subcontractors there is no basis on which to reject bids failing to list subcontractors. Currently, however, the only agency which possesses regulations that require the listing of subcontractors in order to avoid bid shopping is GSA. As a result, only in GSA contracts will a failure to list subcontractors result in nonresponsiveness. Even in GSA contracts the failure to comply with

such a requirement does not automatically disqualify a bid. Where the requirement has not been inserted for the purposes of preventing bid shopping but to aid in determining bidder responsibility, the Comptroller has held that the information may be furnished after bid opening.

In spite of the fact that a requirement for subcontractor listing may have been inserted in an invitation to prevent bid shopping the Comptroller has not consistently found noncompliance a cause for rejection. Where it appeared that in a particular situation bid shopping was an insignificant threat and that permitting the bidder to elect among subcontractors would not result in actual prejudice the Comptroller has permitted award. In one case, for example, where the bidder, rather than designate one supplier of pipe listed two suppliers, the Comptroller found the bid acceptable.[47] It was felt that the threat of bid shopping did not exist because the pipe was not to be specially manufactured for the contract and the difference between the low and next higher bid was great enough that the other bidders would not be prejudiced by permitting the bidder to select between the suppliers.

Recently the Comptroller has created a further exception. While immediately subsequent to the initial policy change in 1963 the Comptroller took the position that any failure to list a required subcontractor demanded rejection, in 1977 a "de minimus" rule was adopted.[48] This rule provides that where the portion of the work which the unlisted subcontractor is to do is inconsi-

quential in relation to contract price, quality, quantity or delivery a bid is acceptable in spite of noncompliance. In creating this exception the Comptroller emphasized the fact that GSA had recommended that such inconsequential deviations be waived.

Another 1977 decision clearly illustrates the Comptroller's willingness to bend to GSA's desire in this area. In the decision the Comptroller concluded that all bids were nonresponsive to the requirement to furnish subcontractor information. However, rather than require the rejection of the low bid, the Comptroller permitted award. In so doing he stated:

> Here, in view of GSA's statement that it . . . would be amenable to waiving the requirement in this instance, it appears that acceptance . . . will result in a contract which will satisfy GSA's requirements. Moreover, it is clear that no other bidder will be prejudiced thereby. The 16 other bids submitted were determined to be nonresponsive to the subcontractor listing requirement. Given this and the disparity between bid prices . . . we fail to see that the other bidders would be prejudiced . . . .[...]

The implications of this decision are clear. Absent actual prejudice, award can be made to a bid failing to comply to a subcontractor listing requirement as long as GSA is willing to waive the requirement in the particular instance. More significantly, analysis of the entire area of subcontractor listing requirements suggests that should GSA delete from its regulations the requirement for subcontractor listing then the Comptroller would in turn revert to his earlier policy of finding all deviations from such a requirement immaterial.

Bid Bonds and Guarantees

Earlier in this paper consideration was given to the development of the Comptroller General's present attitude towards the materiality of deviations from requirements to furnish bid bonds.[243] Through that discussion it was illustrated that the primary principle behind measuring bid acceptability when there is a failure to conform is actual prejudice. More specifically, the Comptroller's concern that through noncompliance with such a requirement a bidder might obtain "two bites at the apple". Granted that such a requirement is now considered essential and deviations from it material,[244] this section will examine the area in order to illustrate how a following of the principles of actual prejudice and obligation has operated to measure the acceptability of nonconforming bids.

Fundamentally two situations can arise which will contribute to a finding of nonresponsiveness in the area of bid bonds and guarantees. The first is situations where the bidder fails to provide the bond, while the second is situations where security is furnished but is deficient in some manner.

Failure to Submit

While it is required that a bid bond be submitted prior to bid opening,[245] the Comptroller has permitted exceptions when it appeared that there would be no potential for a bidder to obtain "two bites at the apple". For example, in one decision, a bid was found acceptable where a bidder had prepared a bid bond, but had misplaced it immediately prior to bid opening, in a location to

which only Government personnel had access.[281] Under these circumstances it was felt that the bidder was presented with no opportunity to elect to qualify or disqualify himself for award after bid opening. On the other hand, bids have been found nonresponsive where the only evidence that a bond was prepared prior to bid opening has come from the bidder or his employees.[282]

That a principle of actual rather than potential prejudice is being applied in this area is confirmed by the fact that the procurement regulations provide that a failure to submit a bid guarantee will not result in rejection when there is but one bid received.[283] The Comptroller has never specifically held that waiver should occur when there is no guarantee in any amount furnished and there is only one bidder. However, the Comptroller has taken the position that an inadequate bid bond will not result in rejection if there are no other acceptable bids.[284] Implicitly, therefore, it would appear that the Comptroller would view a total failure to furnish a bond or guarantee waivable where there were no other acceptable bids. Moreover, the Comptroller has on numerous occasions cited the regulations as authority for exceptions in this area without indicating any concern that this particular exception would violate any principle of responsiveness followed by his office.[285]

Bond Submitted in Insufficient Amount

Where a bond or guarantee has been furnished, but with a penal amount less than that required, the deviation has been considered material and the bid nonresponsive.[286] In such a case a

finding of nonresponsiveness has resulted regardless of whether the deviation was due to a clerical error or the fault of the surety.[252] However, an interesting exception to this general rule has developed. The Comptroller, while holding that the insertion of an incorrect amount requires rejection, has taken the position that the insertion of no amount at all, in certain situations, will not result in a finding of nonresponsiveness. For example, in one case where the surety signed a bid bond and the bond referenced the specific invitation on which the bid was submitted, the Comptroller found the bid responsive even though there was a failure to insert a penal amount. The basis for decision was the belief that under the circumstances the surety knew the extent of its obligation and manifested an intent to be bound in the required penal amount.[253] The holding can be viewed as applying the principle of obligation-but with a twist. Rather than focusing upon whether or not the bidder was obligated in accordance with the invitation, the focus was upon whether or not it appeared that the surety was obligated on the bond in the required amount.

The procurement regulations have also established an exception to the requirement that the penal amount equal that required by the invitation. They provide that a bid is acceptable even though the amount is less than that required as long as the amount of the bond is equal to or greater than the difference between the price stated in the bid and the price stated in the next higher bid.[254] This exception has also been followed by the Comptroller.[255] The rationale behind the exception has not been

clearly expressed, but it would appear to be consistent with the rule against "two bites at the apple". There would be no need to seek correction of the bond after bid opening since the amount of the bond would be sufficient to indemnify the Government in the event it had to make an award to the next highest bidder should the low bidder refuse award.

More recently, the Comptroller has expanded the range of acceptability to include situations where the penal amount is insufficient even to cover the difference between the low and next highest bid. In a 1975 decision the Comptroller, relying upon the minor informalities section of the procurement regulations applied a de minimus rule to find a bid acceptable where the amount of a bond was $55,000 rather than the required $55,284. At first blush this decision appears reasonable since the difference in amount is trivial. However, the de minimus exception under the regulations applies to situations having a trivial impact upon contract price and not to situations involving the difference in the amount between what is required of a bid bond and what is provided. Recognizing this fact it would appear that the Comptroller has misapplied the de minimus exception in this decision.

Defective Bonds and Guarantees

The vast majority of decisions concerned with deviations from requirements to furnish bonds and guarantees have dealt with situations where the deviation has arise from the form in which the guarantee was furnished. Bid acceptability in such cases has depended upon whether the Government, in spite of the deviation,

would receive the full and complete protection it contemplated. Consequently, in each situation the Comptroller has examined the specific fact pattern to determine if the surety appeared to be obligated or if the security furnished, if other than a bid bond, would provide the same protection.

As a result, in many of these decisions the responsiveness of bids has been determined solely on the basis of the Comptroller's own interpretation of general suretyship law. Where this interpretation has led the Comptroller to believe that the surety would be obligated in the manner desired the bid has been found acceptable in spite of the deviation.[208] On the other hand, when the Comptroller has felt that due to the deviation a surety's obligation would not be the same as required the bid has been found nonresponsive.[209] Similarly, where the form of security offered has not been a standard form bid bond, responsiveness has depended upon whether the alternate form of security represented a firm commitment that could not be revoked by the bidder after bid opening.[210]

It would seem that where security is actually furnished, and the deviation is simply one of form, acceptance would not only be consistent with the principles of actual prejudice and obligation but also with that of potential prejudice. As previously indicated, this, at least, has been the position taken by the courts of New Jersey which have consistently applied the potential prejudice principle in measuring the materiality of deviations.[211]

Acknowledgement of Amendments

As a general rule the failure of a bidder to acknowledge

a material amendment will result in a finding of nonresponsiveness regardless of the reason why such a failure occurred.[26] In taking this position the Comptroller has stated:

> If an amendment which affects price, quantity or quality is not acknowledged by the bidder prior to bid opening, his offer is for something other than the performance solicited by the terms of the invitation, including any amendments. To permit him to perform in accordance with the invitation without the unacknowledged amendment would be contrary to the statutes governing advertised procurements.[27]

In measuring the acceptability of bids failing to comply with a requirement to acknowledge an amendment the Comptroller has applied both the principles of actual prejudice and obligation. The resolution of acceptability has depended upon whether the changes enumerated in the amendment were material and if so whether the bidder would be otherwise obligated to conform to those changes.

Determining the Materiality of the Amendment

In most situations the Comptroller has applied the price, quality, quantity or delivery test in determining whether a change occasioned by an amendment was material.[28] As previously indicated, the Comptroller's application of the test of price, quantity, quality, or delivery in the area of amendments has undergone significant alteration over the past several years.[29] Presently, in the situations involving the failure to acknowledge amendments the rule is that where the impact of the amendment on these four characteristics is trivial then the failure to acknowledge the amendment is considered an immaterial deviation. This rule has

been supplemented by the requirement that in determining whether an amendment has a trivial effect on price, the cost impact of the change is compared to the bid total and to the difference between the two low acceptable bids.

In applying the triviality rule the Comptroller has relied upon the procuring agencies to provide an estimate of the impact of the amendment. Where there is no such estimate the Comptroller has not accepted a contractor's estimate of the amendment's impact and has refused to apply the triviality exception. The Comptroller's rationale is based on the fact that by permitting contractors to furnish such estimates they would be placed in a position to become eligible for award after opening by citing costs which would bring them within the triviality exception or to avoid award by citing higher costs.

While it is uncertain where the Comptroller draws the line in determining whether an amendment results in a trivial change in price several recent decisions provide some insight. The Comptroller, for example, has found bids acceptable where the amendment resulted in a price impact as high as $5,240.00. At the same time bids have been found acceptable where the change represented as high as .375% of the total bid price[1] and as high as 2.47% of the difference between the two lowest bids. The acceptance of bids deviating to this extent would clearly violate the principle of potential prejudice. Since the test measures materiality in relation to bid prices it is apparent that the principle of actual prejudice is being applied by the Comptroller.

Even where the impact upon price is considered trivial the Comptroller has found amendment changes material where the impact upon quality or quantity was felt to be significant. In determining whether the amendment has a significant impact upon quality the Comptroller has displayed a tendency to rely upon the opinions of agency officials. The result has been that where the agency has indicated that the amendment resulted in a significant quality impact then the Comptroller has focused upon quality in making his decision. On the other hand, if the agency has indicated a willingness to make award to the deviating bid then resolution has been based upon the amendment's impact upon price.

Consistent with the rule which permits the acceptance of bids offering products or services exceeding invitation requirements, the Comptroller has held that the failure to acknowledge an amendment which merely decreases the cost of performance will not result in nonresponsiveness. The rationale lies in the fact that the bidder, if he failed to agree to the changes resulting from the amendment, would be obligated to perform on a superior basis. Under these circumstances, the Comptroller has felt that failure to acknowledge the amendment would only be prejudicial to the bidder's competitive position and possibly beneficial to the bidder's competitive position of the other bidders. This rule has resulted in some interesting decisions. In one decision where the invitation required flight jackets made of goatskin, which requirement was amended to cattlehide leather,

a bid was found acceptable even though the amendment was not acknowledged. The basis for decision was the fact that goatskin was considered to be a more expensive material than leather. While the amendment would seem to have had a clear impact upon cost, this fact went unmentioned by the Comptroller.

When an amendment has contained several changes, some of which were deductive and others of which were additive, the Comptroller has found the bid nonresponsive even though the overall impact was a net decrease in cost. In such cases the Comptroller has treated the change increasing the cost of performance seperately from the deductive change. Where the additive portion of the change did not qualify as trivial then the failure to acknowledge the amendment has resulted in a finding of nonresponsiveness. However, when the Comptroller has felt that the portion of the amendment which increased cost was trivial the failure to acknowledge the amendment has been treated as an immaterial deviation. The Comptroller has yet to indicate why a distinction is drawn between strictly deductive and deductive plus additive amendments. To be consistent with the rationale used when changes are deductive it would appear as if it should not matter that the changes are both deductive and additive as long as the net result is a decrease in cost. Under such a circumstance the bidder's competitive position would not be improved. It would seem that the Comptroller is drawing the distinction on the basis that the changes resulting in an increase represent Government requirements and the acceptance of a

bid deviating from those requirements would not insure that these requirements would be met.

While the Comptroller has generally followed the test of price, quality, quantity or delivery in determining whether an amendment has resulted in a material change, in several decisions amendments have been considered material in spite of the fact that there may have been only a trivial impact on these four factors. In these decisions the test of materiality has been more absolute. Decisions in which this strict test of materiality has been applied have involved requirements that have been inserted by amendment in order to further a public policy or that might have a significant impact upon the Government's rights under any resulting contract. Amendment changes to which this strict test has been applied include those involving : the revision or insertion of federal wage rate determinations,[84] the addition of a requirement that a minimum percentage of reclaimed fiber be used in manufacturing packing boxes,[85] the inclusion of an economic adjustment clause,[86] and the addition of a clause clarifying subcontractor cost or pricing data requirements.[87] While in some of these decisions it has appeared that the amendment may have had an impact upon price, it has been clearly indicated that impact upon price was not the determining factor.[88] For example, in a decision involving an amendment increasing wage rate requirements the Comptroller indicated that because wage rate determinations result from statutory requirements amendments reflecting their alteration must always be considered material.[89] In other decisions the Comptroller has

supported application of this strict test on the basis that the effect of the amendment would be to alter the legal relationship of the parties. Such a justification was used in one decision where an amendment added a requirement that prior to entering into a subcontract in excess of $1,000,000 a prime contractor first receive clearance from the contracting officer that the subcontractor was in compliance with equal opportunity requirements.[11] The paramount concern in these decisions appears to be that there be no question about a Contractor's obligation to conform to what are considered essential amendment modifications.

Constructive Acknowledgment

As discussed in the preceding chapter, the failure to acknowledge a material amendment has not resulted in a finding of nonresponsiveness where the bid as submitted reflected the fact that the bidder had knowledge of the amendment by incorporating in it one of the changes caused by the amendment.[12] Under such a situation the Comptroller has treated the deviation as immaterial based upon a belief that by displaying an awareness of the amendment the bidder has been obligated to perform all changes enumerated within the amendment.[13]

Certification Requirements

It is common practice in government procurement for the invitation to require that bidders furnish certifications on signed forms attached to the invitation.[14] Additionally, nearly all invitations contain standard forms upon which bidders are required to check various blocks certifying certain information. Not

infrequently, bidders, intentionally or otherwise, fail to furnish such certifications or fill in the required blocks. In determining whether such deviations are material the principle utilized to measure acceptability has generally been that of obligation.

In certain situations the Comptroller has held that the failure to complete a certification is not a material defect. For the most part, these decisions have focused upon the certifications which appear on the standard forms furnished with the invitation. For example, on the reverse side of Standard Form 33 it is required that bidders certify as to whether they are a small business, a regular dealer or manufacturer, whether a contingent fee was paid to obtain the contract, their affiliation with any other company, whether they have participated in a previous contract subject to the Equal Opportunity Clause of the contract and if so whether all compliance reports were filed, that all end products are of domestic origin, that prices were arrived at independently, and that their facilities are nonsegregated. Without exception, the Comptroller has held that the failure to complete one or all of these standard certifications does not render a bid unacceptable. While in some decisions the Comptroller has indicated that failure to complete one of the certifications was an immaterial deviation because the bidder was already bound by its terms, the failure was a minor informality or because the requirement related to bidder responsibility rather than bid responsiveness, more recently

the Comptroller appears to have taken the same approach with all of these certification requirements. In this respect the Comptroller has stated:

> [C]ompletion of the subject representations and certifications is not required to determine whether a bid meets the requirements of the specifications or other solicitation provisions and therefore does not affect responsiveness of the bid, with the result that the failure to complete such items may be waived or aired after bid opening.[fn]

While failure to meet the foregoing certification requirements has not resulted in a finding of nonresponsiveness, a totally different position has been taken when the certification requirement has related to a bidder's offer to meet goals or objectives inserted in the invitation for the purpose of advancing certain public policies. In such situations the failure to complete the certification has resulted in a finding of nonresponsiveness.[fn] In the recent past, within this category, the certification requirement which has most frequently been violated has been contractor certifications of minority manpower utilization goals in federally involved construction contracts. This requirement has been inserted in invitations for the purpose of encouraging affirmative action on the part of construction contractors.

While presently it is no longer required by regulation that invitations contain such a requirement,[fn] in the past the certification requirement has resulted in both confusion on the part of bidders[fn] and a number of decisions regarding responsiveness.[fn] The most notable decision, for purposes of this

analysis, arose out of a bidder's failure to insert on the form provided, his affirmative action goals in a procurement covered by the Washington Plan. While the bidder failed to enter his goals, he did sign the certificate upon which was included a statement of the prescribed ranges of minority manpower utilization which would constitute an effective affirmative action program. Based upon this fact the bidder argued unsuccessfully before the Comptroller that by signing he was bound to the minimum goals in the prescribed range and that, therefore, his bid was responsive. The bidder was more successful before a District Court. It issued an injunction prohibiting award after finding the deviation immaterial, in part, based upon the belief that the bidder was obligated to conform with the minimum goals in spite of the failure to insert his own goals in the spaces provided.

The matter culminated before the Court of Appeal for the District of Columbia in Northeast Construction Company v. Romney. There the lower court's decision was reversed. More significantly, however, in so doing, the Court appeared to refute the primary principles traditionally utilized in federal procurement to determine the acceptability of nonconforming bids. As to the issue of whether the deviation was immaterial because the bidder was bound by his signature to the minimum goals, the Court dismissed the principle of obligation stating:

> Is the procurement officer required to resolve this legal question, which at the very least the wording of the Appendix sought to avoid? Even if he projected as probably that a Federal court would ultimately rule . . . that there was such a commit-

> ment, is the procurement officer required to buy a lawsuit? Is not the Government's interest in this commitment important enough to require it in the bid, as filed, in the form of specific goals, without any question as to supplementation, and without any if, ands, or buts?[11]

The court then turned aside the bidder's argument that the defect was a minor informality, the correction or waiver of which would not be prejudicial to other bidders.[12] In refusing to follow the principle of actual prejudice it stated:

> The specific command of the Appendix A regulation clearly states and reiterates a bid lacking the pertinent information concerning projected employers and specific goals will be deemed nonresponsive. Whether or not other bidders would be prejudiced by subsequential insertion, the Government's broad policy objective may be prejudiced by the omission.[13]

Therefore, in essence, the Court followed a mirror image principle in measuring the effect of the deviation upon the bids acceptability. In so doing it took the position that where a requirement is inserted in an invitation to further social or economic objectives at the behest of a department or agency with government-wide authority to achieve those objectives, standard procurement regulations concerned with bid responsiveness are inapplicable since only the responsible agency can properly determine the impact of the deviation upon the policy objectives.

Such a position would appear to serve only to further confuse an already uncertain situation. The question logically posed by the Court's rationale is why create federal procurement rules at all if they are not to be followed in each situation? While consistency has not been a hallmark of the decisions of the

Comptroller in the area of bid responsiveness, clearly consistency cannot be achieved by what is in essence a court directed mandate to change the rules whenever it is felt that the requirement represents the furtherance of an overriding public policy.

In either event, since the decision in Northeast Construction, where a deviation has related to a certification requirement, the Comptroller has continued to follow his traditional approach in measuring acceptability. In several decisions, for example, bids have been found responsive even in the absence of properly completed affirmative action certificates where it appeared as if the bidder would still be obligated to meet the requirements. Consequently, it would seem that even where a certification is deemed an essential requirement relating to a public policy the Comptroller will continue to decide issues of responsiveness on the basis of established tests of materiality.

Curing Deviations Through Offers to Comply

Occasionally bids are submitted with statements which indicate a bidder's blanket offer to comply with the requirements listed in the invitation. In such cases it has been argued that the offer served to overcome otherwise material deviations in the bid, thereby rendering it acceptable. The Comptroller General's approach to the issue of whether an offer to comply will overcome a material deviation has turned primarily upon whether the deviation resulted from a failure to conform with a descriptive literature requirement and if not whether the language of the offer clearly evidenced an intent to comply with the invitation's

requirements.

The foundation for the Comptroller's current position can be traced to a 1930 decision in which it was held improper for an agency to reject a bid simply because the bidder's commercial product failed to meet an invitation's specifications. In the decision it was stressed that upon acceptance the bidder would be obligated to meet the specifications and that how it did so was of no concern to the Government. This opinion was later cited to support the concept that a blanket offer to comply with specifications would render a bid acceptable notwithstanding material variations in the details of the bid. In a 1957 opinion the Comptroller applied this concept by indicating that the submission of a brochure, modifying certain essential invitation clauses, was cured by a provision within it stating that discrepancies between it and the specifications were not to be construed as an intent to take exception to the specifications.

At the same time, however, this concept was found inapplicable to situations involving a requirement to furnish descriptive data. In such situations, even though a bidder included a clear statement indicating that specified requirements would prevail over discrepancies in its data, the Comptroller held that bids should be rejected. The rationale was based on the fact that adequate data was deemed essential for proper agency evaluation. Thus, where bidders were clearly advised of a requirement to furnish descriptive data it was held that a blanket offer to comply was inadequate to overcome deficiencies in

fulfilling the data requirement.

Recent decisions involving descriptive data requirements appear to have been resolved on a basis consistent with this earlier approach. In "brand name or equal" procurements, for example, the Comptroller has invariably indicated that a blanket offer to comply with specification requirements will not overcome a bidder's failure to conform to a requirement to submit descriptive materials when bidding on an "or equal" basis. In these decisions it has been stressed that a statement that a product complys with the salient characteristics listed in the invitation or a promise to conform to those characteristics is not a substitute for the required data. The basis for these decisions exists in the feeling that without such data the Government would be unable to ascertain exactly what it was purchasing. The position taken is that responsiveness depends upon the completeness of the information submitted or reasonably available to the agency rather than upon an overall offer to comply.

On the other hand, in situations not involving descriptive data requirements the Comptroller has indicated that an offer to comply may be sufficient to cure a material deviation. The key to acceptability has been the language utilized in the offer. There is a fine, almost imperceptable, line between an adequate and an inadequate offer to comply. Where the language has been conclusionary, such as statements that the bidder was taking no exception to the specifications, or that the bid was being

submitted in compliance with the specifications, the offer has been found inadequate. In this regard the Comptroller has taken the approach that where the offer to comply is in general terms and the deviation arises from language that is more specific, then at best the bid is ambiguous. Thus, in one decision a bid was found nonresponsive where in a letter submitted with the bid it was stated that the bidder reserved the right to negotiate prior to award even though within the same letter there appeared general statements to the effect that the bidder was *taking no exception* to the specifications. The basis for decision was the fact that the two statements were conflicting and in such a case the more specific provision was controlling. More recently, the Comptroller has expressed his position as follows:

> An overall offer to conform can cure specific deviations if the "promise or offer makes it patently clear that the offerer did in fact intend to so conform" . . . . The bidder must have "unequivocally offered to provide the requested items in total conformance with the terms and specification requirements of the invitation.

Difficulty in determining what will constitute an adequate offer to comply is created by the fact that in nearly every decision addressing the issue the Comptroller has found the offer inadequate. However, in a 1973 decision the Comptroller did hold that an offer to comply cured an otherwise material deviation. The bidder had submitted his bid on its own quotation form which contained delivery terms at variance from those in the invitation. While this would normally have resulted in a finding

of responsiveness, the Comptroller found the bid acceptable since in a cover letter submitted with its bid the bidder had stated that in the event of discrepancies between its quotation and the specifications the latter would prevail. Award was permitted based upon the fact that this statement removed any doubt regarding the bidder's intention and deprived him of an option to deviate from the invitation's delivery terms after opening.

The Comptroller, therefore, appears to be primarily concerned with whether an offer to comply confirms a bidder's obligation to conform to the invitation. If the offer is specific, clearly indicating that the specifications will control in the event of discrepancies, and the deviation does not result from a failure to comply with a data requirement necessary for bid evaluation, then the offer to comply will overcome a material deviation. Difficulty in understanding past decisions arises due to the fact that most "offers to comply have not been offers but were conclusionary statements and that when there has been a specific offer it has arisen in response to a descriptive data request. The result has, therefore, been that seldom has an offer to comply cured a material deviation.

Recent opinions of the Comptroller appear not to recognize the earlier drawn distinction between offers to comply in general and those in response to descriptive data requirements. For example, in a recent decision the Comptroller both stated that a blanket offer to comply would not remedy noncompliance, citing to earlier descriptive data decisions, and in the very next paragraph

stated that an overall offer to comply could cure a specific deviation, citing to an earlier opinion not involving a descriptive data requirement. Whether this apparent misinterpretation of earlier decisions will gradually change the Comptroller's past position remains to be seen.

CHAPTER THREE

FOOTNOTES

1. DAR 2-405; FPR 1-2.405.

2. 40 Comp. Gen. 458, 459 (1961).

3. Prestex Inc. v. United States, 162 Ct. Cl. 620, 320 F.2d 367 (1963); 54 Comp. Gen. 271 (1971); 50 Comp. Gen. 733 (1971); 30 Comp. Gen. 179 (1950).

4. Harding Pollution Controls Corp., Comp. Gen. Dec. B-182899, 75-2 CPD ¶ 17 (1975).

5. 49 Comp. Gen. 377 (1969); 43 Comp. Gen. 209 (1963); Fabcraft Inc., Comp. Gen. Dec. B-186973, 76-2 CPD ¶384 (1976).

6. 39 Comp. Gen. 86 (1959); Comp. Gen. Dec. B-172227, May 12, 1971, Unpub.

7. Harding Pollution Controls Corp., Comp. Gen. Dec. B-182899, 75-2 CPD ¶ 17 (1975).

8. E.g., 40 Comp. Gen. 458 (1961)(offer of equipment of U.S. rather than U.S. origin); Vanguard Pacific, Inc., Comp. Gen. Dec. B-185397, 76-1 CPD ¶ 313 (1976)(extension lights with neoprene rubber handles instead of plastic handles as required); Sheffield Building Co., Inc., Comp. Gen. Dec. B-181242, 74-2 CPD ¶ 103 (1974)(offer of derrickboat without required spud engine); Comp. Gen. Dec. B-167052, September 19, 1969, Unpub. (offer of surgical detergent with providine-iodine as active ingredient instead of phosphate ester-iodine); Comp. Gen. Dec. B-167429, September 11, 1969, Unpub. (offer of forklift with four six-volt batteries instead of one 24 volt battery); Comp. Gen. Dec. B-163181, February 7, 1968, Unpub. (offer of lighting fixtures smaller than size specified in invitation).

9. E.g., Test Drilling Service Co., Comp. Gen. Dec. B-189682, 77-2 CPD ¶ 193 (1977); Rise, Inc., Comp. Gen. Dec. B-187006, 75-1 CPD ¶ 59 (1975).

10. E.g., 49 Comp. Gen. 211 (1969); Global Fire Protection Co., Comp. Gen. Dec. B-185961, 76-2 CPD ¶ 22 (1976); Webcraft Packaging, Comp. Gen. Dec. B-184750, 75-2 CPD ¶ 334 (1975); Hawthorn Mellody Dairy, Comp. Gen. Dec. B-180422, 74-1 CPD ¶ 244 (1974).

11. Webcraft Packaging, Comp. Gen. Dec. B-184750, 75-2 CPD

334 (1975).

12. Hawthorn Mellody Dairy, Comp. Gen. Dec. B-180422, 74-1 CPD ¶ 244 (1974).

13. Comp. Gen. Dec. B-172227, May 13, 1971, Unpub. (offer of jackets with five buttons instead of four as required found to constitute immaterial deviation since there appeared to be no impact upon cost or quality).

14. E.g., 51 Comp. Gen. 518 (1972)(quality and price); 43 Comp. Gen. 209 (1963)(quality and price). But see Ionics, Inc., 53 Comp. Gen. 909 (1973)(actual prejudice found without discussion of price, quality, quantity or delivery).

15. 51 Comp. Gen. 518 (1972).

16. 43 Comp. Gen. 209 (1963).

17. 38 Comp. Gen. 830 (1959); Comp. Gen. Dec. B-166466, April 22, 1969, Unpub. The Comptroller has also held that a bidder may be permitted to furnish an alternate product after award as long as the product meets and exceeds the invitation's requirements. 48 Comp. Gen. 685 (1969)(providing dual speed tape recorder rather than single speed).

18. 38 Comp. Gen. 830 (1959). Where the product has been superior but did not meet an essential requirement bids have been found nonresponsive. 36 Comp. Gen. 705 (1957); Comp. Gen. Dec. B-166685, June 16, 1969, Unpub.

19. Charles J. Dispenza & Assoc., Comp. Gen. Dec. B-186133, 77-1 CPD ¶ 284 (1977).

20. E.g., National Ambulence Co., Inc., 55 Comp. Gen. 597 (1975); 38 Comp. Gen. 508 (1959); 38 Comp. Gen. 131 (1958); 37 Comp. Gen. 186 (1957); Kipp Construction Co., Comp. Gen. Dec. B-181588, 75-1 CPD ¶ 20 (1975).

21. E.g., 38 Comp. Gen. 131 (1958); 37 Comp. Gen. 186 (1957); 19 Comp. Gen. 450 (1939); 13 Comp. Gen. 169 (1933); E.M. Gostovich Construction Co., Comp. Gen. Dec. B-180362, 74-1 CPD ¶ 74 (1974).

22. E.g., 50 Comp. Gen. 733 (1971); 33 Comp. Gen. 441 (1954).

23. E.g., 38 Comp. Gen. 131 (1958); 20 Comp. Gen. 4 (1940).

24. E.g., Lift Power Inc., Comp. Gen. Dec. B-182604, 75-1 CPD ¶ 13 (1975).

25. 38 Comp. Gen. 612 (1959)(delivery contingent upon termination of strike); 33 Comp. Gen. 441 (1954)(delivery conditioned upon receipt of materials from subcontractors); Montague-Betts Co., Inc., Comp. Gen. Dec. B-182530, 74-2 CPD ¶ 270 (1974)(delivery conditioned upon no supplier delays); E.M. Gostovich Construction Co., Comp. Gen. Dec. B-180362, 74-1 ¶ 74 (1974)(completion by specified date conditioned upon ability to obtain fuel and materials).

26. Allied Asphalt Paving Co., Comp. Gen. Dec. B-189843, 77-2 CPD ¶ 450 (1977)(no responsibility for vandalism).

27. 33 Comp. Gen. 508 (1959); Kaiser Aerospace & Electronics Corp., Comp. Gen. Dec. B-189326, 77-1 CPD ¶ 73 (1977); R. Parks Co., Comp. Gen. Dec. B-186699, 76-2 CPD ¶ 360 (1976); Durable Metal Products Co., Comp. Gen. Dec. B-182864, 75-2 CPD ¶ 337 (1975).

28. National Ambulence Co., Inc., 55 Comp. Gen. 597 (1975) (bid conditioned upon receipt of city license).

29. 50 Comp. Gen. 733 (1971); 5 Comp. Gen. 649 (1926); Fire & Technical Equipment Corp., Comp. Gen. Dec. B-192408, 78-2 CPD ¶ 91 (1978); Fisher-Klosterman, Inc., Comp. Gen. Dec. B-185106, 76-1 CPD ¶ 165 (1976).

30. Page Airways, Inc., 54 Comp. Gen. 120 (1974)(refusing to accept less than $100.00 minimum orders when invitation specified that Government could place minimum orders to $50.00); Marsh Stencil Machine Co., Comp. Gen. Dec. B-188131, 77-1 CPD ¶ 207 (1977)(limiting minimum orders to $50.00 when Government solicited minimum orders to $15.00).

31. 55 Comp. Gen. 445 (1975); 53 Comp. Gen. 24 (1973).

32. 38 Comp. Gen. 131 (1958).

33. E.g., Joy Manufacturing Co., 54 Comp. Gen. 238 (1974); 50 Comp. Gen. 733 (1971); 38 Comp. Gen. 508 (1959); Durable Metal Products Co., Comp. Gen. Dec. B-182864, 75-2 CPD ¶ 337 (1975).

34. E.g., National Ambulence Co., Inc., 55 Comp. Gen. 597 (1975); Kipp Construction Co., Comp. Gen. Dec. B-181588, 75-1 CPD ¶ 20 (1975).

35. 50 Comp. Gen. 733 (1971).

36. Kipp Construction Co., Comp. Gen. Dec. B-181588, 75-1 CPD ¶ 20 (1975).

37. Ionics, Inc., 53 Comp. Gen. 910 (1974).

38. E.g., Joy Manufacturing Co., 54 Comp. Gen. 237 (1974); 48 Comp. Gen. 464 (1969); Commercial Radio Co., Comp. Gen. Dec. B-193048, 78-2 CPD ¶ 397 (1978).

39. 36 Comp. Gen. 259 (1956); 35 Comp. Gen. 684 (1956). This exception is also provided for in the procurement regulations. DAR 2-404.2(d)(i); FPR 1-2.404-2.

40. 35 Comp. Gen. 684 (1956).

41. Id.

42. 38 Comp. Gen. 131 (1958); E.M. Gostovich Construction Co., Comp. Gen. B-180362, 74-1 CPD ¶ 74 (1974).

43. 47 Comp. Gen. 658 (1968); Arcwel Corp., Comp. Gen. Dec. B-191840, 78-2 CPD ¶ 8 (1978).

44. 47 Comp. Gen. 658 (1968).

45. George C. Martin, Inc., 55 Comp. Gen. 100 (1975); General Fire Extinguisher Corp., 54 Comp. Gen. 416 (1974).

46. See 47 Comp. Gen. 658 (1968).

47. Martin & Turner Supply Co., 54 Comp. Gen. 39[illegible]; 42 Comp. Gen. 415 (1963).

48. Comp. Gen. Dec. B-168479, December 31, 1969, Unpub.

49. 54 Comp. Gen. 416 (1974); Comp. Gen. Dec. B-172734, September 7, 1971, Unpub.

50. Arcwel Corp., Comp. Gen. Dec. B-191840, 78-2 CPD ¶ 8 (1978).

51. 36 Comp. Gen. 380 (1956).

52. 46 Comp. Gen. 371 (1966).

53. E.g., Miles Metal Corp., 54 Comp. Gen. 750 (1975); 46 Comp. Gen. 418 (1966).

54. The Comptroller has expressed this concern by stating:

> [T]o hold otherwise affords the bidder who has limited its bid acceptance period an advantage over its competitors . . . . When a bidder limits

> its bid acceptance period, it has the option to refuse award after that time in the event of unanticipated increases in cost, or by extending its bid acceptance period, to accept award if desired. Bidders complying with the invitation's acceptance period limitation would not have that option but would be bound by the Government's acceptance.

Miles Metal Corp., 54 Comp. Gen. 750, 751 (1975).

55. 15 Comp. Gen. 553 (1935).

56. For a discussion of the circumstances which will justify the acceptance of a bid in which the bid acceptance period has expired see Request for Advance Decision, Comp. Gen. Dec. B-191019, 78-1 CPD ¶ 59 (1978).

57. Miles Metal Corp., 54 Comp. Gen. 750 (1975).

58. E.g., 48 Comp. Gen. 19 (1968); 46 Comp. Gen. 418 (1966); Hemet Valley Flying Service Co., Inc., Comp. Gen. Dec. B-191390, 78-1 CPD ¶ 344 (1978); Perry C. Herford, Comp. Gen. Dec. B-187666, 76-2 CPD ¶ 465 (1976).

59. Miles Metal Corp., 54 Comp. Gen. 750 (1975).

60. 46 Comp. Gen. 418 (1966).

61. Hemet Valley Flying Service Co., Inc., Comp. Gen. Dec. B-191390, 78-1 CPD ¶ 344 (1978).

62. International Manufacturing Co., Inc., Comp. Gen. Dec. B-180784, 74-1 CPD ¶ 300 (1974).

63. 47 Comp. Gen. 769 (1968).

64. Columbia Van Lines, Inc., 54 Comp. Gen. 955 (1975).

65. Imperial Eastman Corp., 55 Comp. Gen. 605 (1975); 39 Comp. Gen. 876 (1959); 36 Comp. Gen. 181 (1956); 30 Comp. Gen. 179 (1950); DAR 2-404.2(c); FPR 1-2.404-2(a).

66. 33 Comp. Gen. 441 (1954); 30 Comp. Gen. 179 (1950).

67. 36 Comp. Gen. 181, 183 (1956).

68. 40 Comp. Gen. 279 (1960); 34 Comp. Gen. 364 (1955).

69. 36 Comp. Gen. 181 (1956).

70. Comp. Gen. Dec. B-155939, February 24, 1965, Unpub. The Comptroller has expressed concern that such open ended delivery terms might lead to an arbitrary evaluation of bids. 46 Comp. Gen. 746, 748 (1967). See also John Reiner & Co. v. United States, 163 Ct. Cl. 381, 325 F.2d 438 (1963), cert. denied, 377 U.S. 931 (1964)(finding bid responsive although it failed to offer delivery within 60 days as invitation specified that a failure to offer delivery within 60 days "might" be cause for rejection).

71. Comp. Gen. Dec. B-175342, March 27, 1972, Unpub.

72. Comp. Gen. Dec. B-170237, August 18, 1970, Unpub., aff'd on reconsideration, 50 Comp. Gen. 379 (1970).

73. Comp. Gen. Dec. B-175342, March 27, 1972, Unpub.

74. Memory Display Systems Division of Ednalite Corp., Comp. Gen. Dec. B-187591, 77-1 CPD ¶ 74 (1977).

75. 48 Comp. Gen. 267 (1968); Comp. Gen. Dec. B-147943, March 23, 1962, Unpub.

76. 43 Comp. Gen. 813 (1964).

77. Parker-Hannefin Corp., Comp. Gen. Dec. B-186385, 76-2 CPD ¶ 120 (1976).

78. Imperial Eastman Corp., 55 Comp. Gen. 605 (1975); 38 Comp. Gen. 876 (1959).

79. Comp. Gen. Dec. B-159178, September 6, 1966, Unpub.

80. Imperial Eastman Corp., 55 Comp. Gen. 605 (1975). See also DAR 1-305.3(d); FPR 1-1.316-4(f).

81. 53 Comp. Gen. 32 (1973).

82. 53 Comp. Gen. 320 (1973).

83. 38 Comp. Gen. 801 (1969)(dicta); 34 Comp. Gen. 439 (1955); Jonard Industries Corp., B-192979, 79-1 CPD ¶ 65 (1979).

84. 17 Comp. Gen. 497 (1937).

85. 34 Comp. Gen. 439 (1955).

86. DAR 2-405(iii)(B); FPR 1-2.405(c)(1).

87. Shippers Packaging and Container Corp., Comp. Gen.

Dec. B-184488, 75-2 CPD ¶ 241 (1975).

88. 36 Comp. Gen. 523 (1957); Edmund Leising Building Contractor, Inc., Comp. Gen. Dec. B-184405, 75-2 CPD ¶ 263 (1975); James J. Madden, Inc., Comp. Gen. Dec. 74-2 CPD ¶ 290 (1974).

89. 48 Comp. Gen. 648 (1969).

90. Comp. Gen. Dec. B-169594, October 27, 1970, Unpub.

91. Jonard Industries Corp., Comp. Gen. Dec. B-192979, 79-1 CPD ¶ 65 (1979). In a 1969 decision the Federal Circuit Court for the District of Columbia refused to apply the "incorporation by reference" principle in a situation involving competitive bidding for oil and gas leases. Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969). The Comptroller has distinguished the decision from his own position based on the fact that in Superior Oil the applicable regulations did not provide for the acceptance of unsigned bids accompanied by signed documents while the procurement regulations contain such a provision. Comp. Gen. Dec. B-166190, May 8, 1969, Unpub.

92. 48 Comp. Gen. 801 (1969).

93. Id. at 804.

94. Comp. Gen. Dec. B-175990, June 1, 1972, Unpub.

95. Mannheim Pattern Works, Comp. Gen. Dec. B-186837, 76-2 CPD ¶ 103 (1976); Quinn Glass Co., Comp. Gen. Dec. B-183681, 75-2 CPD ¶ 120 (1975).

96. 34 Comp. Gen. 439 (1955). Both major procurement regulations provide for the acceptance of bids containing typewritten, stamped, or printed signatures where there is evidence that the bidder has authorized this method of committing himself. DAR 2-405(iii)(A); FPR 1-2.405(c)(2).

97. E.g., Marsh Stencil Machine Co., Comp. Gen. Dec. B-188131, 77-1 CPD ¶ 207 (1977).

98. E.g., National Investigation Bureau, Inc., Comp. Gen. Dec. B-191754, 78-2 CPD ¶ 44 (1978).

99. E.g., Standard Form 33A (Solicitation Instructions and Conditions), paragraph 2(b), 41 C.F.R. Subtit. A, Ch. 1, pt. 1-16.901-33A (1978).

100. 48 Comp. Gen. 369 (1968)

101. 49 Comp. Gen. 527 (1970).

102. 50 Comp. Gen. 627 (1971); Corbin Sales Corp., Comp. Gen. Dec. B-182978, 75-1 CPD ¶ 347 (1975).

103. E.g., Huey Paper and Material, Stacor Corp., Comp. Gen. Dec. B-185762, 76-1 CPD ¶ 382 (1976); General Electric Co., Comp. Gen. Dec. B-184873, 76-1 CPD ¶ 298 (1976).

104. E.g., 40 Comp. Gen. 393 (1961); Rix Industries, Comp. Gen. Dec. B-184603, 76-1 CPD ¶ 210 (1976).

105. E.g., The Entwistle Co., Comp. Gen. Dec. B-192990, 79-1 CPD ¶ 112 (1979).

106. E.g., 51 Comp. Gen. 831 (1972).

107. E.g., 51 Comp. Gen. 831 (1972)(resolving uncertainty in bid price by examining price of other bids); 49 Comp. Gen. 851 (1970)(apparent ambiguity resolved by examining purpose behind bidders submission of unsolicited nonconforming descriptive literature). Cf. 50 Comp. Gen. 302 (1970)(impossible to resolve price ambiguity in bid in light of wide divergence in prices bid by all bidders).

108. 50 Comp. Gen. 8 (1970); 43 Comp. Gen. 817 (1964); 36 Comp. Gen. 705 (1957).

109. 16 Comp. Gen. 569 (1936).

110. 39 Comp. Gen. 546 (1960).

111. 39 Comp. Gen. 653 (1960).

112. E.g., 37 Comp. Gen. 785 (1958); 36 Comp. Gen. 705 (1957). For one commentator's interpretation of these decisions see Shnitzer, Ambiguities In Invitations and Bids, Briefing Papers No. 68-6, Federal Publications, Inc., at 8 (1968).

113. 40 Comp. Gen. 393 (1961).

114. See PRC Information Sciences Co., 56 Comp. Gen. 768 (1977).

115. See text accompanying notes 20-43 (Chapter Three), supra.

116. 46 Comp. Gen. 368 (1966).

117. 44 Comp. Gen. 461 (1965)(patent indemnity clause).

118. 45 Comp. Gen. 809 (1966).

119. 47 Comp. Gen. 496 (1968); 46 Comp. Gen. 368 (1966); 44 Comp. Gen. 461 (1965).

120. 46 Comp. Gen. 368 (1966).

121. Id.

122. 47 Comp. Gen. 496 (1968).

123. E.g., 36 Comp. Gen. 705 (1957); E. C. Campbell, Inc., Comp. Gen. Dec. B-185611, 76-1 CPD ¶ 155 (1976).

124. E.g., Dominion Road Machinery Corp., 56 Comp. Gen. 334 (1977)(unsolicited descriptive literature); Comp. Gen. Dec. B-166284, May 21, 1969, Unpub. (unsolicited drawings). The major procurement regulations provide that nonconforming unsolicited data should be disregarded unless it is clear that the bidder intended to qualify his bid through its submission. DAR 2-202.5(f); FPR 1-2.202-5(f). The Comptroller takes a different view, finding that such data creates ambiguity absent a clear display of a bidder's intent to conform. Comp. Gen. Dec. B-169480, May 26, 1970, Unpub.

125. Dominion Road Machinery Corp., 56 Comp. Gen. 334 (1977); 49 Comp. Gen. 851 (1970); Joy Manufacturing Co., Comp. Gen. Dec. B-191902, 78-2 CPD ¶ 127 (1978).

126. 49 Comp. Gen. 851 (1970)(bid submitted with literature describing various nonconforming products found acceptable where it was clear that products described were not being offered as alternates to specification requirements).

127. Dominion Road Machinery Corp., 56 Comp. Gen. 334 (1977).

128. Joy Manufacturing Co., Comp. Gen. Dec. B-191902, 78-2 CPD ¶ 127 (1978).

129. Abbott Laboratories, Comp. Gen. Dec. B-183799, 75-2 ¶ 171 (1975).

130. Id.

131. Id.

132. Sentinel Elec., Inc., Comp. Gen. Dec. B-185681, 76-1 CPD ¶ 405 (1976).

133. A related situation results from a bidder's failure to enter a price for a required item. See text accompanying notes 145-158 (Chapter Three), infra.

134. Comp. Gen. Dec. B-165428, December 26, 1968, Unpub.

135. 43 Comp. Gen. 579 (1964); Broken Lance Enterprises, Inc., Comp. Gen. Dec. B-190206, 78-1 CPD ¶ 279 (1978); Comp. Gen. Dec. B-156145, March 8, 1965, Unpub.

136. 43 Comp. Gen. 579 (1964).

137. General Kinetics, Inc., 56 Comp. Gen. 346 (1977).

138. 40 Comp. Gen. 321 (1960).

139. 45 Comp. Gen. 221 (1965).

140. 52 Comp. Gen. 265 (1972).

141. Dyneteria, Inc., 54 Comp. Gen. 345 (1975); 48 Comp. Gen. 757 (1969). But see 51 Comp. Gen. 352 (1971).

142. 48 Comp. Gen. 757 (1969).

143. Herman H. Neumann Construction, 55 Comp. Gen. 168 (1975); Chemical Technology, Inc., Comp. Gen. Dec. B-179674, 74-1 CPD ¶ 160 (1974).

144. Chemical Technology, Inc., Comp. Gen. Dec. B-179674 74-1 CPD ¶ 160 (1974).

145. E.g., 41 Comp. Gen. 721 (1962); Excavation Construction, Inc., Comp. Gen. Dec. B-180553, 74-1 CPD ¶ 292 (1974).

146. 50 Comp. Gen. 852 (1971).

147. 52 Comp. Gen. 886 (1973); 51 Comp. Gen. 543 (1972); Comp. Gen. Dec. B-176254, September 1, 1972, Unpub.

148. 52 Comp. Gen. 604, 607 (1973)(citations omitted).

149. E.g., T&R Excavators, Comp. Gen. Dec. B-182261, 74-2 CPD ¶ 322 (1974); Comp. Gen. Dec. B-176254, September 1, 1972, Unpub.

150. T&R Excavators, Comp. Gen. Dec. B-182261, 74-2 CPD ¶ 322 (1974).

151. Comp. Gen. Dec. B-[illegible], September 2, 1971, Unpub.

152. Comp. Gen. Dec. B-161012, June 13, 1967, Unpub.

153. Comp. Gen. Dec. B-151276, May 28, 1963, Unpub.

154. 51 Comp. Gen. 543 (1972).

155. 52 Comp. Gen. 604 (1973).

156. Id.

157. Id.

158. Slater Electric Co., Comp. Gen. Dec. B-183654, 75-2 C.P.D. ¶ 126 (1975)(prices for identical items throughout other portions of bid varied no more than $.02).

159. 42 Comp. Gen. 61, 64 (1962).

160. See 49 Comp. Gen. 639 (1970); 45 Comp. Gen. 682 (1966).

161. See L. Bucillo & Sons, Inc. v. Mayor of New Milford, 73 N.J. 349, 375 A.2d 692 (1977)(failure to bid required alternates held to constitute material deviation since inter alia requirement may have been sufficient to deter potential bidders from bidding).

162. Ainslie Corp., Comp. Gen. Dec. B-190878, 78-1 CPD ¶ 43 (1978).

163. 51 Comp. Gen. 529 (1972).

164. Id.

165. 52 Comp. Gen. 604 (1973); Con-Chen Enterprises, Comp. Gen. Dec. B-187795, 77-2 CPD ¶ 284 (1977).

166. Ainslie Corp., Comp. Gen. Dec. B-190878, 78-1 CPD ¶ 340 (1978).

167. International Signal & Control Corp., 55 Comp. Gen. 894 (1976); 48 Comp. Gen. 171 (1968); Comp. Gen. Dec. B-166040, March 24, 1969, Unpub.

168. 49 Comp. Gen. 289 (1969).

169. Comp. Gen. Dec. B-170044, October 15, 1970, Unpub.

170. 49 Comp. Gen. 538 (1970).

171. International Signal & Control Corp., 55 Comp. Gen. 43 (1976).

172. Id.

173. 48 Comp. Gen. 142 (1969).

174. 37 Comp. Gen. 845 (1958).

175. 51 Comp. Gen. 583 (1972).

176. Where descriptive literature describes a product materially different from the invitation's requirements bids have been found nonresponsive on the basis that the bidder would not, upon acceptance, be obligated to comply with those requirements. 46 Comp. Gen. 315 (1966); L.M. Southwest, Inc., Comp. Gen. Dec. B-193299, 79-1 CPD ¶ 217 (1979).

177. 17 Comp. Gen. 940 (1938)(samples); 16 Comp. Gen. 65 (1936)(samples); 15 Comp. Gen. 107 (1935)(descriptive data). But see 5 Comp. Gen. 659 (1926)(samples).

178. 37 Comp. Gen. 845 (1958)(samples); 35 Comp. Gen. 415 (1956)(descriptive data); 36 Comp. Gen. 376 (1956)(descriptive data).

179. 38 Comp. Gen. 532 (1959)

180. Id.

181. 42 Comp. Gen. 598 (1963); DAR 2-202.5(d)(1); FPR 1-2.202-5.

182. E.g., 53 Comp. Gen. 622 (1974); 46 Comp. Gen. 1 (1966); 42 Comp. Gen. 757 (1963); 42 Comp. Gen. 598 (1963).

183. 53 Comp. Gen. 622 (1974); 40 Comp. Gen. 132 (1960).

184. DAR 2-202.5(b); FPR 1-2.202-5.

185. Comp. Gen. Dec. B-159579, July 20, 1966, Unpub.

186. White Plains Electrical Supply Co., Inc., 55 Comp. Gen. 540 (1975); 46 Comp. Gen. 315 (1966); 41 Comp. Gen. 1 (1961).

187. 49 Comp. Gen. 398 (1969); 48 Comp. Gen. 659 (1969).

188. 52 Comp. Gen. 389 (1972); 42 Comp. Gen. 464 (1963).

189. Discussion of the issue of responsibility and its relationship to bid responsiveness is beyond the scope of this paper. See generally Gray, Responsiveness Versus Responsibility: Policy and Practice in Government Contracts, 7 Pub. Contract L. J. 46 (1974).

190. 42 Comp. Gen. 434 (1963).

191. 40 Comp. Gen. 132 (1960); 36 Comp. Gen. 415 (1956).

192. E.g., 41 Comp. Gen. 192 (1961)(bid found nonresponsive where literature submitted consisted of a rough sketch which was insufficient to permit adequate evaluation).

193. 49 Comp. Gen. 377 (1969)(holding that there was an insufficient basis for an agency to reject a bid where a normal engineering evaluation of the information available may have resolved discrepancies in the literature submitted); 39 Comp. Gen. 595 (1960)(finding evaluation possible through the application of recognized physical formula to information available in the bid and invitation).

194. 39 Comp. Gen. 595, 598 (1960).

195. See 50 Comp. Gen. 137 (1970).

196. 40 Comp. Gen. 435 (1961).

197. 50 Comp. Gen. 137 (1970). The Comptroller has held that a bidder may not be permitted to furnish literature after bid opening unless he has first identified in his bid the product to which the literature refers. Pure Air Filter International, 56 Comp. Gen. 608 (1977).

198. DAR 2-204.4; FPR 1-2.202-4.

199. Id.

200. Compare Products Engineering Corp., 55 Comp. Gen. 1204 (1976) with R&O Industries, Inc., Comp. Gen. Dec. B-183688, 75-2 CPD ¶ 377 (1975).

201. R&O Industries, Inc., Comp. Gen. Dec. B-183688, 75-2 CPD ¶ 377 (1975).

202. D. N. Owens Co., 57 Comp. Gen. 231, 78-1 CPD ¶ 66 (1978).

203. Id.

204. Savin Business Machines Corp., Comp. Gen. Dec. B-191165, 78-1 CPD ¶ 447 (1978).

205. E.g., 51 Comp. Gen. 583 (1972).

206. 49 Comp. Gen. 311 (1969).

207. 39 Comp. Gen. 684 (1960); 37 Comp. Gen. 162 (1957). The procurement regulations require that transportation costs must be considered in evaluating bids that are submitted f.o.b. origin. DAR 19-301.1(a); FPR 1-2.202-3.

208. E.g., 48 Comp. Gen. 593 (1969).

209. E.g., Comp. Gen. Dec. B-149165, September 4, 1962, Unpub.

210. See DAR 2-201(a)(B)(X); FPR 1-19.202-3.

211. E.g., 48 Comp. Gen. 593 (1969).

212. Id.

213. Comp. Gen. Dec. B-149165, September 4, 1962, Unpub. (holding that bidder's failure to designate port required rejection since bidder would not be obligated to deliver to nearest port free of charge).

214. 49 Comp. Gen. 517 (1970).

215. Id.

216. 48 Comp. Gen. 593 (1969).

217. Comp. Gen. Dec. B-151342, June 18, 1963, Unpub.

218. 12 Comp. Gen. 434 (1963).

219. Id., International Harvester Co., Comp. Gen. Dec. B-192996, 79-1 CPD ¶ 259 (1979).

220. DAR 2-201(a)(B)(X), 19-210; FPR 1-19.202-3.

221. See 39 Comp. Gen. 684 (1960).

222. 38 Comp. Gen. 819 (1959).

223. 49 Comp. Gen. 496 (1970)(packaging specifications permitted determination of maximum possible weight by providing that not more than 1000 lbs. could be packed in one box); 48 Comp.

Gen. 357 (1968)(invitation specified maximum weight and dimensions thereby making it possible to determine maximum potential weight). Cf. W. A. Apple Manufacturing Inc., Comp. Gen. Dec. B-183791, 75-2 CPD ¶ 175 (1975), aff'd, 76-1 CPD ¶ 143 (1976) (holding that furnishing an "approximate" guaranteed shipping weight did not render bid nonresponsive where even if "approximate" weight was doubled the bid would still remain low).

224. 48 Comp. Gen. 357, 360 (1968).

225. See Comp. Gen. Dec. B-174564, May 1, 1972, Unpub.

226. See Patty Precision Products Co., Comp. Gen. Dec. B-188469, 77-2 CPD ¶ 44 (1977); Comp. Gen. Dec. B-175514, June 29, 1972, Unpub.

227. E.g., Patty Precision Products Co., Comp. Gen. Dec. B-188469, 77-2 CPD ¶ 44 (1977).

228. Comp. Gen. Dec. B-154064, June 23, 1964, Unpub.

229. 41 Comp. Gen. 106 (1961); 39 Comp. Gen. 247 (1959).

230. 41 Comp. Gen. 106 (1961).

231. 39 Comp. Gen. 247 (1959).

232. See 43 Comp. Gen. 206 (1963).

233. Id.

234. 44 Comp. Gen. 526 (1965).

235. James and Stritzke Construction Co., 54 Comp. Gen. 159 (1974); Comp. Gen. Dec. B-171771, April 23, 1971, Unpub.

236. 51 Comp. Gen. 403 (1972).

237. 43 Fed. Reg. 40,227 (1978)(to be codified in 41 C.F.R. § 5B-2.202-70). The regulation's subcontractor listing requirement applys to all construction contracts exceeding $1,000,000.00. Only subcontractors who will perform work in excess of 6% of the total contract price on the contract work site are required to be listed. The Department of the Interior's regulations at one time contained a requirement for subcontractor listing. However, this requirement was deleted from the regulations in 1975. 40 Fed. Reg. 17,848 (1975). The Department of the Defense's policy has been to let industry itself regulate bid shopping rather than to attempt to do so through mandatory subcontractor listing requirements. See 40 Comp. Gen. 688 (1961).

238. 53 Comp. Gen. 27 (1973).

239. Frank Coluccio Construction Co., Inc., 55 Comp. Gen. 955 (1976).

240. John J. Kirlin, Inc., Comp. Gen. Dec. B-187458, 77-1 CPD ¶ 242 (1977)(subcontractor to perform between .026% and .077% of total contract).

241. Id. at 2.

242. George Hyman Construction Co., Comp. Gen. Dec. B-188603, 77-1 CPD ¶ 429 at 5 (1977).

243. See text accompanying notes 41-53 (Chapter Two), supra.

244. 46 Comp. Gen. 11 (1966); 43 Comp. Gen. 268 (1963); 38 Comp. Gen. 532 (1959); Roderick Construction, Comp. Gen. Dec. B-193116, 79-1 CPD ¶ 69 (1979). But see Adelhardt Construction Co. v. United States, 107 F. Supp. 845, 123 Ct. Cl. 456 (1952).

245. 46 Comp. Gen. 11 (1966). Both major procurement regulations provide for the acceptance of late bid guarantees under the same rules established for the consideration of late bids. DAR 10-102.5(iv); FPR 1-10.103-4(c).

246. 40 Comp. Gen. 469 (1961).

247. 42 Comp. Gen. 725 (1963); Roderick Construction, Comp. Gen. Dec. B-193116, 79-1 CPD ¶ 69 (1979); P. W. Parker, Inc., Comp. Gen. Dec. B-190286, 78-1 CPD ¶ 12 (1978); S. Puma and Co., Inc., Comp. Gen. Dec. B-182936, 75-1 CPD ¶ 230 (1975).

248. DAR 10-102.5(i); FPR 1-10.103-4(a).

249. Comp. Gen. Dec. B-142869, May 27, 1960, Unpub. Cf. 39 Comp. Gen. 796 (1960)(failure to submit adequate bid deposit with bid for oil and gas lease waived since there were no other acceptable bids).

250. E.g., A. D. Roe Co., Inc., 54 Comp. Gen. 271 (1974); 46 Comp. Gen. 11 (1966).

251. E.g., 40 Comp. Gen. 561 (1961); 39 Comp. Gen. 827 (1960); Alaska Industrial Coating, Comp. Gen. Dec. B-190295, 77-2 CPD ¶ 290 (1977).

252. Alaska Industrial Coating, Comp. Gen. Dec. B-190295, 77-2 CPD ¶ 290 (1977).

253. 51 Comp. Gen. 508 (1972).

254. DAR 10-102.5(ii); FPR 1-10.103-4(b).

255. 51 Comp. Gen. 802 (1972); 43 Comp. Gen. 238 (1963); 41 Comp. Gen. 74 (1961).

256. Arch Associates, Inc. Comp. Gen. Dec. B-183364, 75-2 CPD ¶ 106 (1975).

257. A. D. Roe Co., Inc., 54 Comp. Gen. 271 (1974); 52 Comp. Gen. 184 (1972).

258. E.g.,General Ship and Engine Works, Inc., 55 Comp. Gen. 422 (1975)(unauthorized signature of principle on bid bond found not to relieve surety of obligation); 39 Comp. Gen. 60 (1959)(improper date on bid bond held to constitute an immaterial deviation); Comp. Gen. Dec. B-170694, December 3, 1970, Unpub. (misnaming obligee on bid bond held immaterial as bond correctly identified principal and bid invitation number).

259. E.g., A. D. Roe Co., Inc., 54 Comp. Gen. 271 (1974) (discrepancy between principal's identity on bid and on bond); Munck Systems, Inc., Comp. Gen. Dec. B-186749, 76-2 CPD ¶ 345 (1976)(bid bond to expire prior to conclusion of Government's 120 day bid acceptance period).

260. Compare 41 Comp. Gen. 585 (1962)(holding that a comercial form bid bond was acceptable even though its terms deviated from the required form bond since by reading the bond and the bid together it appeared that the Government would receive the security it desired) with Southern Space, Inc., Comp. Gen. Dec. B-179962, 74-1 CPD ¶ 155 (1974)(personal check held not to represent a firm and irrevocable commitment).

261. See text accompanying notes 22-24 (Chapter two), supra.

262. E.g., Ira Gelber Food Services, Inc., 55 Comp. Gen. 599 (1975)(failure to receive amendment found to be an insufficient reason to waive requirement to acknowledge amendment); Columbus Services International, Comp. Gen. Dec. B-191070, 78-2 CPD ¶ 338 (1978)(failure to receive amendment from agency does not provide a basis on which requirement to acknowledge amendment may be waived).

263. 42 Comp. Gen. 490, 493 (1963).

264. E.g., 52 Comp. Gen. 544 (1973); B&W Stat Laboratory,

Inc., Comp. Gen. Dec. B-188627, 77-2 CPD 151 (1977); Universal Contracting and Brick Pointing Co., Comp. Gen. Dec. B-188394, 77-1 CPD ¶ 347 (1977); Algernon Blair, Inc., Comp. Gen. Dec. B-182626, 75-1 CPD ¶ 76 (1975).

265. See text accompanying notes 60-65 (Chapter Two), supra.

266. 52 Comp. Gen. 544 (1973).

267. See Ira Gelber Food Services, Inc., 55 Comp. Gen. 599 (1975).

268. Id. Cf. 53 Comp. Gen. 64 (1973)(refusing to consider contractor's estimate in light of estimate received from agency).

269. Ira Gelber Food Services, Inc., 55 Comp. Gen. 599 (1975).

270. Algernon Blair, Inc., Comp. Gen. Dec. B-182626, 75-1 CPD ¶ 76 (1975).

271. Universal Contracting and Brick Pointing Co., Comp. Gen. Dec. B-188394, 77-1 CPD ¶ 347 (1977).

272. Algernon Blair, Inc., Comp. Gen. Dec. B-182626, 75-1 CPD ¶ 76 (1975).

273. Inscom Electronics Corp., 53 Comp. Gen. 569 (1974).

274. Vanbar, Comp. Gen. Dec. B-184800, 75-2 CPD ¶ 385 (1975).

275. See e.g., Inscom Electronics Corp., 53 Comp. Gen. 569 (1974)(finding amendment altering specifications to have a material impact on quality based on contracting officer's report that change was significant).

276. Compare 52 Comp. Gen. 544 (1973) with Inscom Electron- Corp., 53 Comp. Gen. 569 (1974).

277. See text accompanying notes 17-18 (Chapter Three), supra.

278. 41 Comp. Gen. 550 (1962); Shippers Packaging and Container Corp., Comp. Gen. Dec. B-184488, 75-2 CPD ¶ 241 (1975); Titan Mountain States Construction Corp., Comp. Gen. Dec. B-183680, 75-1 CPD ¶ 393 (1975); Imperial Fashions, Inc., Comp. Gen. Dec. B-182730, 75-1 CPD ¶ 45 (1975).

279. Titan Mountain States Construction Corp., Comp. Gen. Dec. B-183680, 75-1 CPD ¶ 393 (1975).

280. 41 Comp. Gen. 550 (1962).

281. Imperial Fashions, Inc., Comp. Gen. Dec. B-182730, 75-1 CPD ¶ 45 (1975).

282. Spartan Oil Co., Inc., Comp. Gen Dec. B-185182, 76-1 CPD ¶ 91 (1976).

283. Titan Mountain States Construction Corp., Comp. Gen. Dec. B-183680, 75-1 CPD ¶ 393 (1975).

284. E.g., Porter Contracting Co., 55 Comp. Gen. 615 (1976)(Davis-Bacon wage rate determination); Columbus Services International, Comp. Gen. Dec. B-191070, 78-2 CPD ¶ 338 (1978) (Service Contract Act wage determination); Rothwell Bros. Inc., Comp. Gen. Dec. B-190311,77-2 CPD ¶ 316 (1977)(Davis-Bacon wage determination).

285. Comp. Gen. Dec. B-177747, April 11, 1973, Unpub.

286. Aqua-Trol Corp., Comp. Gen. Dec. B-191648, 78-2 CPD ¶ 41 (1978).

287. 50 Comp. Gen. 11 (1970).

288. Aqua-Trol Corp., Comp. Gen. Dec. B-191648, 78-2 CPD ¶ 41 (1978)(indicating that amendment adding economic adjustment clause may have had an impact upon price but even if that impact was minimal the amendment was material because it changed the legal relationship of the parties). Kuckenberg-Arenz, Comp. Gen. Dec. B-184169, 75-2 CPD ¶ 67 (1975)(finding that modification of wage rate determination had an effect on price while at the same time indicating that even if that impact was minimal the amendment would still be considered material).

289. Kuckenberg-Arenz, Comp. Gen. Dec. B-184169, 75-2 CPD ¶ 67 (1975).

290. Cibro Petroleum, Comp. Gen. Dec. B-189330, B-189619, 77-2 CPD ¶ 221 (1977).

291. See text accompanying notes 70-73 (Chapter Two), supra.

292. Inscom Electronics Corp., 53 Comp. Gen. 569 (1974); Imperial Fashions, Inc., Comp. Gen. Dec. B-182252, 75-1 CPD ¶ 45 (1975).

293. E.g., 51 Comp. Gen. 370 (1971)(price certification); 51 Comp. Gen. 329 (1971)(affirmative action certification); 50 Comp. Gen. 844 (1971)(affirmative action certification); Department of the Interior - request for advance decision, Comp. Gen. Dec. B-193109, 78-2 CPD ¶ 432 (1978)(affirmative action certification).

294. E.g., Standard Form 33 (Solicitation, Offer and Award), 41 C.F.R. Subtit. A, ch. 1, pt. 1-16.901-33 (1978).

295. Id. This form is utilized by Government agencies for supply and service contracts. See P. Schnitzer, Government Contract Bidding 69 (1976).

296. Bryan L. and F.B. Standley, Comp. Gen. Dec. B-186573, 76-2 CPD ¶ 60 (1976).

297. 50 Comp. Gen. 697 (1971)("Buy American" certification); Comp. Gen. Dec. B-165186, November 7, 1968, Unpub. (Independent Price Determination and "Buy American" certifications).

298. Tennessee Valley Service, Inc., Comp. Gen. Dec. B-186380, 76-1 CPD ¶ 410 (1976)(Contingent Fee and Small Business certifications); Comp. Gen. Dec. B-165186, November 7, 1968, Unpub. (Contingent Fee and Small Business certifications).

299. Comp. Gen. Dec. B-165186, November 7, 1968, Unpub. (Equal Opportunity certification).

300. Bryan L. and F.B. Standley, Comp. Gen. Dec. B-186573, 76-2 CPD ¶ 60 p. 4 (1976).

301. E.g., 51 Comp. Gen. 370 (1971); Ed-Mor Electric Co., Inc., Comp. Gen. Dec. B-187348, 76-2 CPD ¶ 431 (1976); Wilpar Construction Co., Comp. Gen. Dec. B-184582, 76-1 CPD ¶ 56 (1976); Burnham Construction Co., Comp. Gen. Dec. B-183361, 75-1 CPD ¶ 348 (1975); Comp. Gen. Dec. B-174932, March 3, 1972, Unpub.

302. Executive Order 11,246, 3 C.F.R. 339 (1965) prohibits covered federal contractors and subcontractors from discriminating against any employee or applicant for employment based on race, color, religion, sex or national origin. In addition, contractors and subcontractors are required to take affirmative action in employment of minorities. The Secretary of Labor has been given government-wide authority to adopt rules, regulations and orders deemed essential to achieve the purposes of the order. Id. at § 201.

303. Effective May 8, 1978 the procedure requiring independent contractor certification of goals for minority manpower

utilization was discontinued. 43 Fed. Reg. 18,672 (1978). Under current regulations the goals are automatically inserted in invitations without any action on the part of bidder's required. 41 C.F.R. 60-4 (1978).

304. See R. Nash & J. Cibinic, supra note 1 (Introduction) at 550.

305. E.g., Rossetti Contracting Co., Inc. v. Brennan, 508 F.2d 1039 (7th Cir. 1975); Northeast Construction Co. v. Romney, 485 F.2d 752 (D.C. Cir. 1973); Otis Elevator Co. v. Washington Metropolitan Area Transit Authority, 432 F. Supp. 1089 (D. D.C. 1976); Bartley, Inc., 53 Comp. Gen 451 (1974); 51 Comp. Gen. 329 (1971); 50 Comp. Gen. 844 (1971).

306. The Department of Labor established several methods to insure compliance with affirmative action. The major metropolitan areas, including Washington D.C., were covered by imposed plans. See 14 Fed. Reg. 14,888 (1978).

307. 50 Comp. Gen. 844 (1971).

308. See Northeast Construction Co. v. Romney, 485 F.2d 752, 755 (D.C. Cir. 1973).

309. Id.

310. Id. at 757 (emphasis supplied).

311. It was argued by the bidder that the procurement regulation specifically provided that the failure to furnish information concerning the number of a bidder's employees was a minor informality. FPR 1-2.405(b).

312. Northeast Construction Co. v. Romney, 485 F.2d 752, 759 (D.C. Cir. 1973).

313. Id. at 760.

314. E.g., Bartley, Inc., 53 Comp. Gen. 451 (1974); 51 Comp. Gen. 329 (1971); Armor Elevator Co., Inc., Comp. Gen. Dec. B-190572, 78-1 CPD ¶ 250 (1978).

315. 10 Comp. Gen. 160 (1930).

316. 38 Comp. Gen. 300 (1958); 37 Comp. Gen. 27 (1957) (dicta); 36 Comp. Gen. 415 (1956)(dicta).

317. 37 Comp. Gen. 27 (1957)(dicta).

318. 46 Comp. Gen. 1 (1966)(bid indicating that there would be full compliance with specifications); 41 Comp. Gen. 192 (1961)(bid included statement that the final result of performance would be a facility fully complying with requirements); 40 Comp. Gen. 132 (1960)(indicating that product offered would meet requirements); 36 Comp. Gen. 416 (1956)(stating that discrepancy would be resolved in favor of the specifications in the invitation).

319. 36 Comp. Gen. 416 (1956).

320. E.g., 50 Comp. Gen. 193 (1970)(promise to conform); 45 Comp. Gen. 312 (1965)(stating that offered product would fully meet specifications); Cummins-Wagner Co., Inc., Comp. Gen. Dec. B-188486, 77-1 CPD ¶ 462 (1977)(transmittal letter stating that equipment was offered "in compliance with the specification"); Ocean Applied Research Corp., Comp. Gen. Dec. B-186476, 76-2 CPD ¶ 393 (1976)(statement that product met all salient characteristics); Big Joe Manufacturing Co., Comp. Gen. Dec. B-182063, 74-2 CPD ¶ 263 (1974)(statement that bidder was quoting in full compliance with specifications).

321. Ocean Applied Research Corp., Comp. Gen. Dec. B-186476, 76-2 CPD ¶ 393 (1976).

322. 50 Comp. Gen. 193 (1970).

323. Ocean Applied Research Corp., Comp. Gen. Dec. B-186476, 76-2 CPD ¶ 393 (1976).

324. Id.

325. 42 Comp. Gen. 96 (1962).

326. Searle CT Systems, Comp. Gen. Dec. B-191307, 78-1 CPD ¶ 433 (1978); Spectrolab, Inc., Comp. Gen. Dec. B-189947, 77-2 CPD ¶ 438 (1977).

327. 42 Comp. Gen. 96 (1962).

328. Id.

329. Searle CT Systems, Comp. Gen. Dec. B-191307, 78-1 CPD ¶ 433 p. 3 (1978).

330. E.g., 42 Comp. Gen. 96 (1962); 40 Comp. Gen. 432 (1961)(typewritten exceptions found to take precedence over standard form language); Searle CT Systems, Comp. Gen. Dec. B-191307, 78-1 CPD ¶ 433 (1978)(statement that bid was compliant

to specifications inadequate to cure deviations); Spectrolab, Inc., Comp. Gen. Dec. B-189947, 77-2 CPD ¶ 438 (1977)(statement that offer was "in strict and full compliance with all requirements of the Invitation for Bids" inadequate to cure deviations); T&R Excavators, Comp. Gen. Dec. B-182261, 74-2 CPD ¶ 322 (1974) (statement that bidder proposes to do all work in accordance with invitation inadequate to cure deviation).

331. Comp. Gen. Dec. B-179024, October 30, 1973, Unpub. The bid's offer to comply appeared as follows:

> The attached quotation describes in detail the subject machine, however, if any discrepancies appear between our quotation and your specifications the latter will prevail.

This language is noticeably similar to the language utilized in earlier decisions in which it was indicated that an offer to comply was adequate to cure a material deviation. See 38 Comp. Gen. 300 (1958); 37 Comp. Gen. 27 (1957).

332. Searle CT Systems, Comp. Gen. Dec. B-191307, 78-1 CPD ¶ 433 (1978).

CONCLUSION

An overall view of the various tests utilized in each of the selected areas reveals a general consistency in the approach followed by the Comptroller General in measuring the materiality of deviations from requirements listed in invitations. When a deviation has arisen from a failure to conform to a requirement deemed to be essential to the Government it has been considered material. In such a case, unless it has been felt that upon acceptance the bidder would be obligated to conform to the requirement in spite of the deviation, the bid has been found nonresponsive. On the other hand, where the requirement has been nonessential, bids have been acceptable as long as it appeared that there would be no actual prejudice. Consequently, where it has appeared that the bidder could neither obtain a competitive advantage over other actual bidders as a result of the deviation nor be placed in a position from which he could control his eligibility after bid opening, the Comptroller has found the deviation immaterial.

Aside from the foregoing general observations, several aspects of the Comptroller's approach to the issue of bid responsiveness warrant comment. It is by now apparent that the Comptroller has placed extensive reliance in the principle of obligation. In every major area of bid responsiveness this principle has provided the foundation upon which have been erected various tests which, if met, will result in bid acceptability in spite of what would otherwise be considered a material

deviation. However, as pointed out by the decision in Northeast Construction Co. v. Romney, there is one basic difficulty that arises from applying the principle of obligation. Regardless of whether it appears that a bidder would be "obligated" under the tests devised by the Comptroller, the ultimate decision would have to be resolved in a Federal court should any bidder contest the presence of such an "obligation". Whether in all cases such a resolution would be consistent with the Comptroller's view is subject to question. This would seem particularly true in some of the areas in which the Comptroller has created tests based on the principle of obligation. For example, whether a Federal court would concur in the Comptroller's view that a bidder is required to furnish an item he did not bid upon at the same price as that which he bid on similar items in his bid is debatable. Similarly, whether a court would agree that a bidder is obligated to comply with all material changes in an amendment simply because he submitted a bid reflecting some of the changes caused by the amendment is uncertain. It appears that in many of the situations discussed in this paper the Comptroller has been more concerned with whether there was evidence of an intent to conform on the part of the bidder rather than with whether there was an existing obligation to conform.

Also apparent has been the constant fluctuation and uneven application by the Comptroller of the rules of bid responsiveness. This fluctuation has resulted both from pressure from agencies, such as has occurred in the area of subcontractor listing require-

ments, and from the Comptroller's own changing views. In large measure this willingness to alter the rules of bid responsiveness would seem attributable to the fact that the Comptroller General has never uniformly addressed the subject of bid responsiveness. Rather, as illustrated throughout this paper, the current position has developed separately within each area of bid responsiveness.

Finally, it is obvious that there has been little concern for the principle of potential prejudice in the decisions of the Comptroller. As a result, it is possible that an award could be made that so deviated from the advertised requirements that there would in turn be a failure to realize advertised procurement's stated goal of providing all who might desire to compete an opportunity to compete. More significantly, as this paper has illustrated, under the Comptroller's system of bid responsiveness it is possible to make an award to an acknowledged nonresponsive bid as long as there is no actual prejudice and the Government's essential requirements are met. It is difficult to establish why the Comptroller has failed to observe the principle of potential prejudice. An answer may lie in the fact that the Comptroller's initial decisions involving the review of awards under advertised procurement addressed, not the issue of bid responsiveness, but whether there existed justification for an agency to reject the lowest priced bid. This underlying concern with obtaining the most favorably priced bid remains apparent in many of the

Comptroller's decisions. By following the principles of actual prejudice and obligation it is possible to avoid rejecting many more of these favorably priced bids than would be possible by strict application of the principle of potential prejudice. Recent trends clearly indicate that in the future the Comptroller will continue to decide questions of materiality without regard to potential prejudice.

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